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~~MICHAEL RODAK, JR., CLERK~~

IN THE

## Supreme Court of the United States

OCTOBER TERM, 1977

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No. .... **77-419**

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HOUSTON BELT & TERMINAL RAILWAY COMPANY,  
*Appellant,*

v.

JOE W. WHERRY,  
*Appellee.*

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ON APPEAL FROM THE TEXAS COURT OF CIVIL APPEALS,  
FIRST SUPREME JUDICIAL DISTRICT

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**JURISDICTIONAL STATEMENT**

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FIRST SUPREME JUDICIAL DISTRICT

**JURISDICTIONAL STATEMENT**

**OPINION BELOW**

The opinion of the Texas Court of Civil Appeals filed on December 2, 1976 is reported at 548 S.W.2d 743, and appears as Appendix B to this Statement. No other written opinions have been delivered.

**JURISDICTION**

This is a libel action, brought pursuant to the Texas libel statute, Tex.Rev.Civ.Stat.Ann.art. 5430 (1958). The Texas Court of Civil Appeals rendered its judgment adverse to appellant on December 2, 1976 and overruled appellant's Motion for Rehearing on March 10, 1977. On May 25, 1977, the Texas Supreme Court refused appellant's Application for Writ of Error. On June 22, 1977, the Texas

Supreme Court denied appellant's Motion for Rehearing. This appeal is being docketed within 90 days after such date, June 22, 1977. Appellant's Notice of Appeal was filed in the Texas Court of Civil Appeals on July 13, 1977.

This Court's jurisdiction is invoked under 28 U.S.C. § 1257(2) (1970). This appeal draws into question the validity of the Texas libel statute, Tex.Rev.Civ.Stat.Ann. art. 5430 (1958), on the ground that it is repugnant to the United States Constitution, and the decision below is in favor of its validity.

The Texas libel statute, Tex.Rev.Civ.Stat.Ann.art. 5430 (1958), reads:

A libel is a defamation expressed in printing or writing, or by signs and pictures, or drawings tending to blacken the memory of the dead, or tending to injure the reputation of one who is alive, and thereby expose him to public hatred, contempt or ridicule, or financial injury, or to impeach the honesty, integrity, or virtue, or reputation of any one, or to publish the natural defects of any one and thereby expose such person to public hatred, ridicule, or financial injury.

Although this statute appears only to recite a definition of libel, Texas courts have held that it pre-empts the common law of libel in Texas. *Guisti v. Galveston Tribune*, 105 Tex. 497, 150 S.W. 874, 877 (1912); *International & G.N.R. Co. v. Edmunson*, 222 S.W. 181, 185 (Tex. Comm'n App. 1920, judgment adopted). Accordingly, libel actions are statutory in Texas.

Appellant relies upon the following cases to sustain the jurisdiction of the Supreme Court to review the judgment below by direct appeal: *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 476 (1975); *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 678 (1968). Insofar as this appeal also presents a federal question arising under the Railway

Labor Act, 45 U.S.C. 151 et seq. (1970),<sup>1</sup> appellant relies upon *Prudential Ins. Co. v. Cheek*, 259 U.S. 530, 547 (1922) to sustain jurisdiction.

In the event this Court does not consider appeal to be the proper mode of review, appellant requests that the papers upon which this appeal is taken be regarded and acted upon as a petition for writ of certiorari pursuant to 28 U.S.C. § 2103 (1970).

#### **QUESTIONS PRESENTED**

1. Whether the prohibitions of *Gertz*<sup>2</sup> against liability without fault and "presumed" damages apply in a libel action against a non-media defendant?
2. Whether statements made in a Public Law Board Award, rendered under authority of the Railway Labor Act, 45 U.S.C. § 153 (1970), are absolutely privileged in a libel action, as a matter of paramount federal law?

#### **STATEMENT OF THE CASE**

This is a libel suit brought against appellant Houston Belt & Terminal Railway Company (hereinafter "the Belt" or "appellant") by a former employee, Joe Wherry. Wherry alleged that the Belt branded him a "drug addict." (Tr. 3).<sup>3</sup> The trial court rendered judgment for the plaintiff after a jury trial, for both actual and punitive damages totaling \$200,000.00. The Texas Court of Civil Appeals

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<sup>1</sup> The pertinent section, 45 U.S.C. 153 (1970) is reproduced *infra*, in Appendix G.

<sup>2</sup> *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1975).

<sup>3</sup> In Texas appellate practice, the "Transcript" consists of copies of the pertinent pleadings and papers filed in the trial court, which are bound together, paginated, and certified to the appellate courts. References to the Transcript herein will be shown as "Tr.", followed by the page number.

affirmed, and the Texas Supreme Court has refused appellant's application for writ of error.

On July 14, 1972, Plaintiff Joe Wherry fainted in the course of his employment as a switchman for defendant railroad in Houston, Texas (S.F. 158).<sup>4</sup> He was immediately taken to the emergency room at St. Joseph's Hospital, where he was examined by Dr. Bill Robins, the designated chief surgeon for the Belt. (S.F. 5, 160). To determine the cause of Wherry's fainting, Dr. Robins ordered a urinalysis. (S.F. 13). Dr. Robins received the laboratory report on the urinalysis (Plaintiff's Exhibit No. 1) on about July 18, 1972. (S.F. 22). It showed that the drug screen test was "Methadone Positive." Below the stamped word "methadone" appeared the handwritten word "trace."

Dr. Robins reported the test results orally to D. H. Montgomery, the Superintendent of Safety and Assistant Manager of Personnel for the Belt. (S.F. 23, 71). At Mr. Montgomery's request, Dr. Robins furnished him the same information in a written report (Plaintiff's Exhibit No. 2), which was dated July 24, 1972. (S.F. 27). In his report Dr. Robins wrote:

Remarks: Since there did not appear to be evidence of injury serious enough to cause him [Wherry] to pass out, some other cause for his syncope was sought. A urine was obtained; both routine and for Drug screening. The routine urinalysis was negative. The Drug screening test was positive for Methadone. Methadone is a drug which is often used to give heroin addicts since it has essentially the same effects as heroin, but is much less expensive. It can in some doses produce syncope.

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<sup>4</sup> In Texas appellate procedure, the transcription of trial testimony is called the "Statement of Facts", customarily abbreviated "S.F.". References to the Statement of Facts herein will be shown as "S.F.", followed by the page number.

Upon receiving Dr. Robins' initial oral report, Mr. Montgomery prepared a written report (Belt Exhibit No. 1), dated July 19, 1972, which was routinely sent to seven Belt officials. (S.F. 77, 98-101). In it, Mr. Montgomery described Wherry's accident and injuries, and also related the information he had received from Dr. Robins by telephone. (S.F. 77, 78). The report read in part:

In Dr. Robins' opinion the injury to Mr. Wherry's knee was not of sufficient significance to cause him to pass out and therefore he thought a urine specimen [sic] advisable. Laboratory results of the urine specimen [sic] was [sic] positive for methadone which is a synthetic drug commonly used in the withdrawal treatment of heroin addicts.

On August 9, 1972, after a hearing, Wherry was dismissed for failing to report his accident timely and for being an unsafe employee. (S.F. 84). Wherry sought assistance from the Veterans' Administration, apparently believing his statutory Veterans' Re-employment Rights had been violated. (S.F. 108). Prompted by Wherry's inquiry, Mr. Merle Rider of the U.S. Department of Labor wrote to Tim Minahan of the Belt on August 17, 1972, requesting information about Wherry's discharge. In response, Mr. Minahan wrote a letter dated August 23, 1972, to Mr. Rider. (Plaintiff's Exhibit No. 5). In that letter, Mr. Minahan recounted that Wherry had been discharged from the Belt for violation of safety and accident reporting rules, and Mr. Minahan also added the following paragraph:

It was also determined by the Doctor who examined Mr. Wherry following his injury, caused when Mr. Wherry passed out and fell, that traces of methadone were present in Mr. Wherry's system, which constitutes grounds for dismissal under Uniform Code of Operating Rules, Rule "G".

Subsequently, Wherry appealed his discharge, as he was entitled to do, under the Railway Labor Act, 45 U.S.C. § 151, et seq. (1970). The dismissal was ultimately affirmed by Public Law Board No. 1259 on November 13, 1974, over two years later. The three-man Public Law Board was convened as an arm of the National Railroad Adjustment Board under authority of Public Law 89-456, 45 U.S.C. § 153 (1970). (S.F. 123, 136-38, 226). Mr. Minahan of the Belt signed the award (Plaintiff's Exhibit No. 6) as one of the three members. The final paragraph of the Award read as follows:

The testimony at the investigation disclosed that Claimant [Wherry] was, in fact, responsible for his accident in that he was "under the influence of" or "had been using" a drug known as methadone. This, in the Board's opinion, was sufficient justification for his dismissal, even though he was not formally charged with violation of Rule G of Carrier's Uniform Code of Operating Rules.

There was no evidence that Wherry sustained any actual damage as a result of any writing by the Belt.

#### **HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW**

1. *Failure to submit fault issue.* In accordance with the Texas libel statute, this case was submitted to the jury as a strict liability action. Prior to submission of the case upon special issues<sup>5</sup> Appellant specifically objected to the trial court's failure to submit a constitutionally required fault issue. With respect to Special Issue No. 1, appellant objected:

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<sup>5</sup> The seven special issues and the jury's verdict are recited in the trial court's judgment, which is attached hereto as Appendix A.

Further, defendants would object to Special Issue No. 1 because there is an attempt to impose liability without fault in that no inquiry is made concerning the culpability of the defendant and culpability or harm is inferred from the term "a narcotics user in violation of Railroad Rule G." Defendants would rely in that regard on *Gertz v. Robert Wells, Inc. [sic]*, 94 Supreme Court, 2997, 1974, Supreme Court of the United States case.

(Tr. 34-35). This same objection was repeated four additional times in the course of defendant's objections to the charge, once in connection with each of Issues 2, 3, 4 and 5. (Tr. 35-36, 36, 37, 38). The trial court overruled the objections. (Tr. 39). When this ruling was assigned in the Court of Civil Appeals as error, that Court held:

The appellants did not object to the charge on the basis of improper submission of the question of fault. They have waived this question. Rule 274, Texas R.C.P.

548 S.W.2d at 752, *infra* B-18.

Appellant recognizes that a litigant's procedural default in state court may constitute an "adequate and independent" ground or affirming a state court judgment, even when the federal question presented is meritorious. Appellant submits, however, that the state court's holding of waiver in this instance is erroneous and as a matter of federal law is not predicated upon any "adequate" state ground. The precise basis for the state court's waiver holding is not clear. By citing Tex.R.Civ.P. 274,<sup>6</sup> the state court opinion suggests that appellant's objection was not sufficiently clear or precise. Yet appellant's five-times repeated objection

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<sup>6</sup> Tex.R.Civ.P. 274 reads, in pertinent part: "A party objecting to a charge must point out distinctly the matter to which he objects and the grounds of his objection. . . ."

with specific citation to authority was surely sufficient to point out specifically the error complained of.

The apparent explanation for the court's waiver holding is confusion on the court's part over the meaning of "actual malice." The court mistakenly characterized appellant's complaint as an objection to "improper submission" of a fault issue, rather than to *omission* of a fault issue. This characterization and the court's discussion of common-law malice, about which no complaint was made on appeal, suggest that the state court confused common-law malice (i.e., ill will) with the similar-sounding but conceptually distinct term "actual malice", which is a truth-related fault standard.<sup>7</sup>

Whatever may have been the precise basis for the Texas court's waiver holding, appellant submits that such basis cannot suffice as an "adequate" state ground because it is not predicated upon any legitimate state interest. Appellant made its objection known at the proper time and with specificity. The same objection has been urged and argued at every step of the appellate process. Under the circumstances, the state waiver holding should be held an inadequate device by which to prevent appellate review by this Court of the federal question. *See Douglas v. Alabama*, 380 U.S. 415, 421-22 (1965); *Davis v. Wechsler*, 263 U.S. 22, 24 (1923).

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<sup>7</sup> This Court has distinguished the two concepts as follows: "[A]ctual malice" is a term of art, created to provide a convenient shorthand expression for the standard of liability that must be established . . . . As such it is quite different from the common-law standard of "malice" generally required under state tort law to support an award of punitive damages." *Cantrell v. Forrest City Publishing Co.*, 419 U.S. 245, 251-52 (1974).

2. *Failure to require proof of "actual damages."* Prior to the submission of this case to the jury, appellant objected that there was no evidence to support submission of Special Issue No. 6, concerning damages. (Tr. 39). This objection was overruled. (Tr. 39). The Court of Civil Appeals rejected appellant's challenge to the sufficiency of the evidence, specifically holding that under Texas law damages could be presumed. It said:

Assuming *Gertz* [*Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1975)] and *Foster* [*Foster v. Laredo Newspapers, Inc.*, 541 S.W.2d 809 (Tex. 1976)] apply only to media defendants, under the common law and Article 5430, V.T.C.S. [Tex.Rev.Civ.Stat.Ann.], injury to Wherry's reputation is presumed, and with that injury presumed, his mental anguish may be taken into consideration in awarding damages.

548 S.W.2d at 753, *infra* Appendix B-19, 20. By motion for rehearing and at all subsequent appellate steps, appellant has objected that there was no evidence of actual damages and that the Court of Civil Appeals applied the wrong legal standard to review sufficiency of the evidence.

3. *Submitting Public Law Board Award to jury.* When it became apparent during trial that plaintiff intended to reply upon the Public Law Board Award as a libel, appellant filed a trial amendment specifically pleading absolute privilege:

With regard to any statement made in the course of either a hearing, brief, appeal, or award of the Public Law Board, or any such body, your defendants would claim an absolute privilege.

(Tr. 7). Before submission of the case to the jury, appellant objected that Special Issue No. 1 was overboard and not limited to writings which were not privileged. (Tr. 33).

The objection was overruled. (Tr. 39). The Court of Civil Appeals rejected appellant's absolute privilege plea, holding in effect that appellant had waived the absolute privilege defense. It said:

We are inclined to the view that the award of the Public Law Board, listed as the fourth writing above, was absolutely privileged. Absent an objection to its admission or a request for an instruction to the jury that it was a privileged communication, and in view of other evidence of libel in the record, we cannot say the trial court erred in allowing the jury to consider it.

548 S.W.2d at 748, *infra* B-8.

This implicit waiver holding should not be regarded as an "adequate" state ground for denying review of the federal question. There is no precedent under Texas law for the view that an objection to evidence is required to preserve a pleaded defense. Further, until the decisions of the Texas courts in this case, it was clear that objection to the form of an issue was sufficient to preserve error for appellate review, without tender of a curative instruction. Tex.R.Civ.P. 274; *Moulton v. Alamo Ambulance Service, Inc.*, 414 S.W.2d 444, 449 (Tex. 1967). A new state rule, invented in a particular case, does not provide an "adequate" state ground so as to preclude review of the federal question in that same case. *N.A.A.C.P. v. Alabama*, 377 U.S. 288, 294-97 (1964). It is unquestioned that appellant's objection to the change and pleading by way of trial amendment were sufficient to call the trial court's attention to the error complained of, and this same error has been raised at every appellate step. Under the circumstances, appellant submits there is no adequate state ground for denying review of the absolute privilege issue.

## THE FEDERAL QUESTIONS ARE SUBSTANTIAL

### I. The GERTZ Prohibitions Against Liability Without Fault and Presumed Damages Apply in Libel Actions Against Non-Media Defendants

The Texas Supreme Court has authoritatively held that the Texas libel statute, Tex.Rev.Civ.Stat.Ann.art. 5430 (1958), establishes a strict liability cause of action in which damages may be presumed:

By the terms of the present law, a libelous publication, contrary to the common-law rule, becomes actionable without the proof of malice, whether it is or is not libelous per se.

Under the present law, it is not necessary to the right to maintain an action for a publication not libelous per se to allege or prove special damages.

. . . [T]he manifest purpose of the Legislature in enacting this law was to cover the entire subject of libel as applied to civil actions, without regard to the rules of the common law and holdings of the courts on the subject, and to materially enlarge the rights of those who may be the subject of libelous publications.

*Guisti v. Galveston Tribune*, 105 Tex. 497, 504-05, 150 S.W.2d 874, 877 (1912). The only elements required to be proved are the defamatory content of the writing and its publication.

In *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), this Court held that the First Amendment precludes imposing liability in defamation actions by public officials unless it is proved that the defendant made a defamatory statement with "'actual malice' — that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 279-89. In *Gertz v. Robert Welch*,

*Inc.*, 418 U.S. 323, this Court recognized additional First Amendment implications for defamation actions. It held: (1) liability cannot be imposed without a finding of truth-related fault, *Id.* at 347, and (2) unless "actual malice" is proved, states may not permit recovery of punitive or presumed damages. *Id.* at 349. These principles were reaffirmed in *Time, Inc. v. Firestone*, 424 U.S. 448, 461 (1976). The Texas Supreme Court has recognized that the *Gertz* holdings apply to libel actions in Texas, and adopted simple negligence as the applicable fault standard. *Foster v. Laredo Newspapers, Inc.*, 541 S.W.2d 809, 818-19 (1976).

The instant case was submitted to the jury and reviewed by the Texas Court of Civil Appeals on the theory that the *Gertz* holdings applied only to cases involving "media" defendants, such as newspapers and radio stations. The Court of Civil Appeals expressly predicated its holding upon the assumption that *Gertz* applies "only to media defendants." 458 S.W.2d at 753, Appendix B-19, 20. This Court has not ruled on the precise question of *Gertz'* application to non-media defendants. This federal question is an important one, and appellant believes the state court's holding is not in accord with applicable decisions of this Court, including the *Gertz* decision itself.

While it is true that *Gertz* and *Firestone* involved defendants who were media publishers as well as publishers in the technical sense used in defamation law, the *Gertz* holdings are not and should not be limited to media defendants. There is no such limitation contained in the Court's opinions. When in *New York Times Co. v. Sullivan*, the Court chose to distinguish between two classes of plaintiffs, public and non-public, it expressed this distinction in plain and unmistakable language. No such distinction can be found in *Gertz* or *Firestone*. The disinclination of this Court to distinguish between media and non-media de-

fendants is seen in the application of the *New York Times* rule to both media and non-media defendants alike over the past decade. See *Henry v. Collins*, 380 U.S. 356 (1965) (county attorney and police chief sued private individual for statements made in a letter); *St. Amant v. Thompson*, 390 U.S. 727 (1968) (deputy sheriff sued candidate for public office for bribery accusation); *Linn v. Plant Guard Workers*, 383 U.S. 53 (1966) (non-union worker sued union for calling him a "scab").

To create two classes of defendants, media and non-media publishers, subject to different First Amendment standards, would be to imply necessarily that the press has a greater right to free expression than private individuals. This notion, that the press has greater First Amendment rights than individuals, is without precedent and should be squarely rejected. It was expressly rejected by one court in *Davis v. Schuchut*, 510 F.2d 731, 734 n. 3 (D.C. Cir. 1975). It was impliedly rejected in *Pell v. Procunier*, 417 U.S. 817, 834-35 (1974), when this Court held that newsmen had no greater rights of access to interview state prisoners than members of the general public, and in *Branzburg v. Hayes*, 408 U.S. 665 (1972), when the Court held newsmen had no special First Amendment privilege protecting the confidentiality of their sources.

Further, granting defamation plaintiffs greater rights against non-media individuals than against the press would introduce both practical and legal anomalies into the law. Although the media's power to injure reputation is infinitely greater than that normally possessed by individuals, the plaintiff's right of recovery would be greater against individuals. Imposing strict liabilities on individuals but not on the media would conflict directly with the loss-spreading rationale which underlies strict liability in other areas of

the law. Finally, such a distinction would place a greater risk of suffering large defamation verdicts on uninsured individuals and businesses, rather than on the media, which are more likely to recognize the risk of defamation suits and to procure protective insurance.

In *Jacron Sales Co. v. Sindorf*, 350 A.2d 688 (Md. 1976), the Maryland Court of Appeals considered the applicability of the *Gertz* rule to non-media defendants, and concluded that there was no basis for distinguishing media and non-media cases. It held that the Supreme Court would apply the fault rule and the "actual damages" requirement to a non-media case if the question were presented to it. Similarly in *Rowe v. Metz*, 564 P.2d 422 (Colo. App. 1977), the Colorado court held squarely that *Gertz* applies to media and non-media defendants alike.

The American Law Institute has recommended the adoption of the negligence fault standard in all defamation actions, those against non-media defendants as well as those against media defendants. *RESTATEMENT OF TORTS (SECOND)* § 580B (Tent. Draft No. 21, April 5, 1975). The Institute has predicted that a restriction of the *Gertz* holding to media cases is "unlikely." *Id.* comment d.

Appellant submits that the Texas courts' failure to require a finding of fault and proof of actual damages in the instant case constitutes error of constitutional magnitude upon an important federal question and warrants review and reversal by this Court.

## **II. A Public Law Board Award, Rendered Pursuant to the Federal Railway Labor Act, is Absolutely Privileged in a Libel Suit.**

The Public Law Board Award introduced into evidence affirmed Wherry's dismissal from the Belt on the basis of

evidence that he had been using methadone. The Board was created under Public Law 89-456 (S.F. 226), which is codified as the second division of 45 U.S.C. § 153 (1970), *infra* G-10 through 12, a section of the Railway Labor Act. The statute creates the National Railroad Adjustment Board, and authorizes it to act through special subsidiary 3-member boards. The boards are to be composed of a carrier representative, a union representative, and a neutral member appointed by the National Mediation Board. The Public Law Board which rendered the award introduced into evidence as Plaintiff's Exhibit No. 6 was a special board convened under this statute. (S.F. 79, 123, 137-38, 226). Awards of the special boards are enforceable in United States District Courts. The function of the National Railroad Adjustment Board is to settle minor employment disputes which arise in the railroad industry. *Gunther v. San Diego & Arizona E.R. Co.*, 382 U.S. 257, 261 (1965). Thus the Public Law Board was created by federal statute and exercised an adjudicative function.

In *Mock v. Chicago, R.I. & P.Ry.*, 454 F.2d 131 (8th Cir. 1972), a libel action, the Court held statements made in the course of proceedings before the National Railroad Adjustment Board to be absolutely privileged. The Court recognized that the suit arose from "proceedings authorized by federal statute" which presented "overriding federal policy considerations." 454 F.2d 133. To the same effect is *Macy v. Transworld Airlines, Inc.*, 381 F.Supp. 142 (D.Md. 1974).

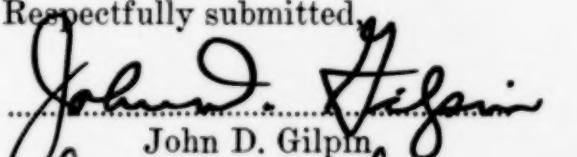
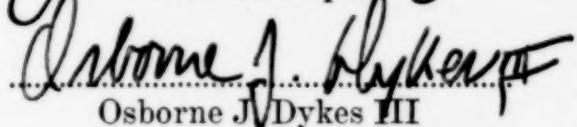
In the instant case, the Texas Court of Civil Appeals declared itself "inclined to the view" that the Public Law Board Award was absolutely privileged. 548 S.W.2d at 748, Appendix B-8. Its reason for declining review was the supposed waiver discussed above.

This Court has never decided the precise question of absolute immunity under the Railway Labor Act from suit for libel, and appellant submits that the state court holding of waiver does not rest upon adequate state grounds and does not preclude review in this Court of the important federal question involved.

### **CONCLUSION**

For the foregoing reasons, probable jurisdiction should be noted.

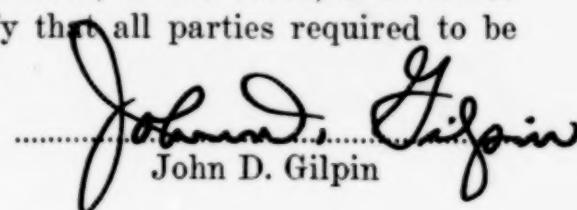
Respectfully submitted,

  
John D. Gilpin  
  
Osborne J. Dykes III

FULBRIGHT & JAWORSKI  
800 Bank of the Southwest  
Building  
Houston, Texas 77002  
*Attorneys for Appellant*

### **CERTIFICATE OF SERVICE**

I hereby certify that on this 14 day of September, 1977, three copies of this Jurisdictional Statement were mailed, by first class mail, postage prepaid, to George Pletcher, Esquire, Helm, Pletcher, Hogan & Burrow, 2800 Two Houston Center, Houston, Texas 77002, counsel for appellee. I further certify that all parties required to be served have been served.

  
John D. Gilpin

### **APPENDICES**

#### **A THROUGH G**

IN THE DISTRICT COURT OF  
HARRIS COUNTY, TEXAS  
165TH JUDICIAL DISTRICT

No. 926,782

JOE W. WHERRY  
v.  
HOUSTON BELT & TERMINAL RAILWAY COMPANY

**JUDGMENT**

BE IT REMEMBERED that on the 27th day of January, 1976, at a regular term of this Court, there came on to be heard, in due order, the above entitled and numbered cause; whereupon came the plaintiff, Joe W. Wherry, in person and by his attorneys of record, and came also the defendants, Houston Belt & Terminal Railway Company, T. Minahan and D. H. Montgomery, by and through their attorneys, and all parties announced ready for trial; whereupon a jury of twelve duly qualified jurors were tested, selected, impaneled and sworn and said cause proceeded to trial; whereupon the pleadings of the parties having been stated to the jury, all parties then introduced their testimony at which time the evidence and testimony adduced on behalf of the parties having been concluded and the parties having rested, and after having heard the arguments of counsel and having been given the charge of the Court the Jury returned into open Court on January 29, 1976 its verdict, to-wit:

**"ISSUE NO. 1:**

Do you find from a preponderance of the evidence that the Defendant Railroad stated in writing that Joe Wherry was a narcotics user in violation of Railroad Rule G?

A-2

Answer "We do" or "We do not".

Answer: "*We do*".

If you have answered Special Issue No. 1 "We do", and only in that event, then answer:

ISSUE NO. 2:

Do you find from a preponderance of the evidence that such statements, if any, were substantially false and untrue?

Answer "We do" or "We do not".

Answer: "*We do*".

If you have answered Special Issue No. 2 "We do", and only in that event, then answer:

ISSUE NO. 3:

Do you find from a preponderance of the evidence that the Plaintiff received an injury to his reputation or good name?

Answer "We do" or "We do not".

Answer: "*We do*".

If you have answered Special Issue No. 3 "We do", and only in that event, then answer:

ISSUE NO. 4:

Do you find from a preponderance of the evidence that the statements made were a proximate cause of the injury to Plaintiff's reputation or good name?

Answer "We do" or "We do not".

Answer: "*We do*".

A-3

If you have answered Special Issue No. 2 "We do", and only in that event, then answer:

ISSUE NO. 5:

Do you find from a preponderance of the evidence that the Defendant acted with malice in regard to the statements made?

You are instructed that "Malice" is defined as follows: Ill will, bad or evil motive, or such gross indifference to the rights of Plaintiff as amounted to a willful or wanton act done intentionally and without just cause or excuse on the part of the party accused of such acts.

Answer "We do" or "We do not".

Answer: "*We do*".

ISSUE NO. 6:

What sum of money, if any, do you find from a preponderance of the evidence, would reasonably compensate Plaintiff for injuries, if any, suffered as a result of such statements, if any?

Answer in dollars and cents, if any. You are instructed that you are to take into consideration the following elements of damage and none other.

- (1) Injury to character reputation.
- (2) Mental suffering or anguish.
- (3) Financial injury to Plaintiff's business or occupation.

Answer: \$150,000.

ISSUE NO. 7:

What sum of money, if any, do you find from a preponderance of the evidence that Joe Wherry should be

awarded against Houston Belt & Terminal Railway Company as exemplary damages?

"Exemplary damages" means an amount which you may in your discretion award as an example to others and as a penalty or by way of punishment, in addition to any amount which may have been found by you as actual damages.

Answer in dollars and cents, if any.

Answer: \$50,000.

We, the jury, have answered the above and foregoing special issues as herein indicated, and herewith return same into court as our verdict.

To be signed by those rendering the verdict if not unanimous.

William S. Granek	Ruth White
Frank Smith	William Scott
Billy Wise	Charles Vickers
Pam Nutt	Marie Lee
Leotis Nugent	William Nash

The aforesaid answers and verdict of the Jury were duly received by the Court, the Jury was polled by the Court and acknowledged the verdict as that of the ten jurors who signed it, and upon motion it was ordered that the verdict be filed and it was so filed. Based upon such verdict, and after motions duly made for judgment, the Court finds that judgment should be entered as follows:

### I.

It is ORDERED, ADJUDGED AND DECREED by the Court that plaintiff, Joe W. Wherry, do have and recover of and from the defendants, Houston Belt & Terminal Railway Company, T. Minahan and D. H. Montgomery, jointly and

severally, TWO HUNDRED THOUSAND DOLLARS (\$200,000); together with interest thereon at nine per cent (9%) per annum from this date until paid, and for all costs of Court incurred in this cause.

JUDGMENT RENDERED AND ENTERED this 9th day of February, 1976.

/s/ .....

PRESLEY E. WERLEIN, JR., Judge

APPROVED AS TO FORM:

FULBRIGHT & JAWORSKI

By: .....

John D. Gilpin

HELM, PLETCHER, HOGAN & BURROW

By: /s/ .....

George E. Pletcher

[548 S.W.2d 743]

• • • • •  
NO. 16,755

IN THE  
COURT OF CIVIL APPEALS  
FOR THE FIRST SUPREME JUDICIAL  
DISTRICT OF TEXAS AT HOUSTON

HOUSTON BELT & TERMINAL RAILWAY  
COMPANY ET AL,

*Appellant,*

v.

JOE W. WHERRY,

*Appellee.*

**OPINION**

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• • • • •

PEDEN, Justice.

Mr. Joe Wherry alleged in this libel action that the appellants had made a false written statement branding him a drug addict. His specific complaint was that on or about August 23, 1972, and prior thereto, the defendant, Houston Belt & Terminal Railway Company, acting through its agents and employees, T. Minahan, D. H. Montgomery, and Bill Robins, acting in the course and scope of their employment for defendant, Houston Belt & Terminal Railway Company, wrote published and caused to be delivered a report that methadone had been found in plaintiff's system, and that this "is a synthetic drug commonly used in the withdrawal treatment of heroin addicts."

The appellants filed a general denial, denied that the report was maliciously made or was known by them to be untrue, and asserted that any statements made by them

were qualifiedly privileged. Their trial amendment alleged that any statements made in the course of either a hearing, brief, appeal, or award of the Public Law Board, or any such body, would be absolutely privileged.

At the close of the evidence Wherry dismissed his action against Dr. Robins. In

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response to special issues the jury found that (1) the defendant Railroad stated in writing that Wherry was a narcotics user in violation of Railroad Rule G, 2) such statements were false, 3) Wherry received an injury to his reputation or good name, 4) the statements made were a proximate cause of the injury to his reputation or good name, 5) the defendant acted with malice in regard to the statements made, 6) \$150,000 would reasonably compensate Wherry for injuries suffered as a result of such statements, and 7) he should be awarded \$50,000 against the Railway as exemplary damages.

The trial court overruled defendants' motion for judgment notwithstanding the verdict and their amended motion for new trial. They complain in twenty-five points of error.

Wherry was first hired by the Belt in September 1969 as a switchman. After working seven months he was drafted into the Army where he remained until December, 1971. He attended college for a semester, then returned to work as a switchman for the Belt in June, 1972. When the Belt allowed him to resume his position with full seniority, the union challenged this action and claimed time for another man every day that Wherry worked. On July 14, 1972, Wherry sustained a knee injury as he was attempting to climb on a fence to pass signals to other railroad em-

ployees. He sat down, then fainted, receiving cuts on his face. He was examined by Dr. Robins, the designated chief surgeon for the Belt, who treated his cuts and ordered two tests run by the hospital laboratory to learn why he had fainted: one for diabetes and the other, a drug screening, to see if the fainting was drug-related. The lab report was received by Dr. Robins and July 18 stamped "DRUG SCREEN METHADONE POSITIVE." Below the stamped word "METHADONE" appears the handwritten word "trace." Dr. Robins explained that a trace is a minute amount and that one test is not enough to indicate that Wherry was a drug user. He reported by telephone to Mr. Montgomery, superintendent of safety and assistant manager of personnel for the Belt and the official to whom Dr. Robins customarily reported, that "we had obtained a positive methadone, with a trace" and that "methadone was a drug which was used usually in treating heroin addicts, to get them off of heroin and onto the methadone." He told Montgomery he couldn't say this means anything, but it might be investigated further. He intended to convey only the possibility that Wherry was a heroin or methadone user, not that he was a user. Dr. Robins testified that methadone will show up in one's urine for only about twenty-four hours. At Montgomery's request Dr. Robins furnished a narrative report dated July 24, 1972. Its pertinent contents will be later quoted as writing.

On July 19, 1972, after talking to Dr. Robins, Montgomery had prepared a written report describing Wherry's accident, his injuries, and the telephone conversation with Robins. Montgomery's report will be quoted later, in part, as writing. The report was sent to seven Belt officials, including Superintendent O. R. Adams. Each received it by reason of his position and duties at the Belt. This was the reporting procedure usually followed for any accident that resulted in loss of time.

On July 21, Dr. Robins released Wherry to return to work, but the Belt suspended him the same day by letter from O. R. Adams, pending a formal investigation into alleged injury. The "investigation", or hearing, was held on August 1. Wherry first heard of the methadone finding when Montgomery read the doctor's report and his own report at the hearing. He then had another urinalysis run for drugs in his system. The report on that test was made by a Dr. John Spikes and was received by the Belt on August 7; it stated that Wherry's urine sample revealed the presence of a compound, whose characteristics resembled methadone, but that further analysis showed that the compound was not methadone or any of the commonly employed drugs of abuse. Wherry testified that he had never taken heroin, methadone, or any narcotics. On August 9, Wherry was dismissed for being an unsafe employee and

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for failure to timely report his accident even though, as we will see, the elapsed time was very short. He was not dismissed for violation of Rule G, which provides that the use of intoxicants or narcotics is prohibited.

After his discharge from the Belt, Wherry sought assistance from the Veterans' Administration on the grounds that he was discharged without cause. Mr. Merle Rider of the U. S. Department of Labor wrote defendant Mr. Minahan asking about Wherry's discharge. Minahan replied by letter dated August 23, 1972, that Wherry was dismissed for violation of safety and accident reporting rules and making another statement which we will notice as writing.

Wherry appealed his discharge under the Railway Labor Act, and his dismissal was affirmed by Public Law Board No. 1259 on November 13, 1974. The Board was convened

as an arm of the National Railroad Adjustment Board under authority of Public Law 89-456, 45 U.S.C. § 153. Its three members were Mr. Minahan, representing the Belt, Mr. A. J. Cotton, representing the union and Wherry, and Mr. Burl E. Hays, a neutral member appointed by the National Mediation Board.

The award was filed with the National Mediation Board. It will be quoted as writing later. It was signed by Hays and Minahan. Cotton did not sign it.

We look first to these points of error:

9. "The trial court erred in submitting Special Issue No. 1, over proper objection, because there was no evidence that any defendant stated in writing that plaintiff was a drug user."
10. "The trial court erred in overruling defendants' amended motion for new trial because the evidence was factually insufficient to support the jury's affirmative answer to Special Issue No. 1."
11. "The trial court erred in submitting Special Issue No. 2, over proper objection, because there was no evidence that defendants' statements were substantially false."
12. "The trial court erred in overruling defendants' amended motion for new trial because the evidence was factually insufficient to support the jury's affirmative answer to Special Issue No. 2."

These are the excerpts from the four writings in evidence (referred to above) which must be looked to in reviewing this case:

1. Montgomery's July 19, 1972, accident report. Only pertinent part:

"Laboratory results of the urine specimen was positive for methadone, which is a synthetic drug com-

monly used in the withdrawal treatment of heroin addicts."

2. Dr. Robins' letter on the lab results sent to Montgomery on July 24, 1972. Pertinent part:

"The Drug screening test was positive for Methadone. Methadone is a drug which is often used to give heroin addicts since it has essentially the same effects as heroin, but is much less expensive. It can in some doses produce syncope . . ."

3. Minahan's letter of August 23, 1972, to Mr. Rider of the U. S. Department of Labor, set out above:

"It was also determined by the Doctor who examined Mr. Wherry following his injury, caused when Mr. Wherry passed out and fell, that traces of methadone were present in Mr. Wherry's system, which constitutes grounds for discharge under Uniform Code of Operating Rules, Rule G."

4. The Public Law Board award, dated November 13, 1974. Pertinent part:

"Carrier should not have removed Claimant Wherry from service prior to the investigation in view of the above facts. The Board will therefore allow Yardman Wherry pay for all time lost commencing July 21, 1972, until August 23, 1972, the date he was dismissed by the Carrier. "The testimony at the investigation disclosed that Claimant was, in fact, responsible for his accident in that he was 'un-

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der the influence of' or 'had been using' a drug known as methadone. This, in the Board's opinion, was sufficient justification for his dismissal, even though he was

not formally charged with violation of Rule G of Carrier's Uniform Code of Operating Rules."

We think it clear that Dr. Robins' letter was not libelous, and did not fit the inquiry in Issue No. 1, and we do not believe the jury considered it did so in answering the issues.

Wherry contends that the first writing listed above, Montgomery's report, was libelous because it implied that he was using methadone and was a heroin addict, it failed to reflect Dr. Robins had said that only a trace was shown and that further investigation was needed. Wherry argues that the implication was plain and it was false. Montgomery testified during the trial that Wherry could not, in good faith, have been accused of being a narcotic user.

We have noted that the third writing listed, Minahan's letter of August 23, 1972, was written in response to Mr. Rider's August 17, 1972 inquiry on behalf of Wherry as to whether he had been discharged without cause in violation of his reemployment rights as a veteran. Minahan's reply, set out above, stated that the doctor determined that traces of methadone were found in Wherry's system and that this constitute grounds for dismissal under Rule G. We conclude that since Rule G prohibits the use of narcotics, the jury was entitled to conclude from this letter that Minahan was stating for the Belt that Dr. Robins had found traces of methadone in Wherry's system, so Wherry had used narcotics in violation of Rule G. This despite Minahan's testimony during the trial that it would have been false to suggest that Wherry was in violation of Rule G, and despite the fact that the Belt had, two weeks earlier, received Dr. Spikes's report that further analysis of an August 1 test showed that the compound in Wherry's test was not methadone or any of the commonly employed drugs of abuse.

We are inclined to the view that the award of the Public Law Board, listed as the fourth writing above, was absolutely privileged. Absent an objection to its admission or a request for an instruction to the jury that it was a privileged communication, and in view of other evidence of libel in the record, we cannot say the trial court erred in allowing the jury to consider it.

Under their points of error 9 and 10, complaining of the submission of Special Issue No. 1 based on no evidence and insufficient evidence, the appellants contend that the various writings introduced into evidence were not ambiguous, that as a matter of law they did not state that Wherry was a narcotics user, and therefore they were not actionable as libelous. Clearly, the defendants did not use the exact words asked about in the first issue.

The determination of the meaning of language that is ambiguous or of doubtful import is the province of the jury. The test is: What effect would the publication have upon the mind of the ordinary reader? *Guisti v. Galveston Tribune*, 105 Tex. 497, 150 S.W. 874 (1912); *Sears, Roebuck and Company v. Coker*, 428 S.W.2d 710 (Tex. Civ. App. 1968, writ ref. n. r. e.); 36 Tex. Jur. 2d 482, Libel and Slander § 156.

We consider Montgomery's report, Minahan's letter, and the Public Board award to be capable of the interpretation inquired about in the first special issue and hold that there was sufficient evidence to support the jury's answer to it. There is evidence that the recipients of the various writings gave the same import to the language as did the jury. Montgomery's report was sent to seven Houston Belt officials including Superintendent Adams. Wherry testified that when he returned to work after the injury it was Adams who told him that he was being withheld from serv-

ice pending an investigation, and Adams wrote Wherry a letter to that effect. Although Adams did not mention the use of narcotics, it may be assumed that as superintendent of the Belt he was familiar with the rule that no yardman would be removed

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from his job prior to an investigation except for just and sufficient cause, such as a violation of General Rule G or an act of violence. The evidence indicates that Montgomery's report caused Adams to believe Wherry was a narcotics user. We overrule points nine and ten. The next points concern the second issue.

Special Issue No. 2 reads:

"Do you find from a preponderance of the evidence that such statements, if any, were substantially false and untrue?"

Wherry testified that he had not used methadone and that when he left the service he passed a test which indicated he had not been using narcotics. Dr. Spikes' letter stated that on the basis of his test on August 1 there was no methadone or drugs of abuse in Wherry's system. Dr. Robins testified that the drug screen on the urinalysis was run with a number of others, some three days after the accident. We have noticed Dr. Robins' testimony that the technician's report did not give enough information on which to form a sensible opinion as to the test and how it applied to Wherry. He said it was a bare investigation (it would bear investigation?) and that he did not intend to give the impression or suggest that Wherry was a heroin or methadone user.

We overrule the appellants' eleventh and twelfth points.

The appellants' fifth point of error is that the trial court erred in submitting Special Issue No. 1, over proper objection, because it is prejudicially multifarious and is not limited to any particular writing. They argue that each writing, if defamatory, gives rise to a separate and distinct cause of action and say it follows that a plaintiff has the burden of establishing each element of his case with regard to each writing, so the defendant has the right to a determination of his defenses with regard to each. The exact wording of the first special issue was:

"Do you find from a preponderance of the evidence that the Defendant Railroad stated in writing that Joe Wherry was a narcotics user in violation of Railroad Rule G?"

The jury was given this definition:

"By the term 'DEFENDANT RAILROAD,' as used in this charge, includes the agents, representatives, officers, doctors and employees of the Houston Belt & Terminal Railroad Company, other than the Plaintiff, Joe Wherry."

The appellee's reply is that since the adoption of revised Rule 277, Texas Rules of Civil Procedure, Texas courts have unanimously given wide discretion to the trial judge to submit issues either separately or broadly.

Rule 277 states in part:

"It shall be discretionary with the court whether to submit separate questions with respect to each element of a case or to submit issues broadly. It shall not be objectionable that a question is general or includes a combination of elements or issues."

Prior to the 1973 amendment of Rule 277, our issues in negligence cases were required to be submitted separately and distinctly when the special issue form of submission

was used. Our Supreme Court stated in *Haas Drilling Co. v. First National Bank in Dallas*, 456 S.W.2d 886 (Tex.1970):

"In his 1969 Supplement on Special Issue Submission in Texas, Hodges notes the distinction in special issue submission in negligence and non-negligence cases; at page 71, he states: 'Since *Roosth & Genecov Production Co. v. White*, 152 Tex. 619, 262 S.W. 2d 99 (1953), it is quite clear that there will be no reversal in non-negligence cases simply because the issue is too broad or too small. The trial court has almost complete discretion, so long as the issue in question is unambiguous and confines the jury to the pleading and the evidence.' In fact, the opinion in *Roosth & Genecov Production Co.* (a negligence case) said: 'We hold it was reversible error to submit the issues in question in the form used and that on the next trial separate issues should be submitted for each item of defectiveness alleged and

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proved. At the same time we do not consider that we are overruling *City of Houston v. Lurie* [148 Tex. 391, 224 S.W.2d 871 (1949)] or *Howell v. Howell* [147 Tex. 14, 210 S.W.2d 978 (1948)] or even limiting those of negligence to which they might be applicable.'

The appellants say that the courts have not relied upon the formalistic "distinct and separate" rule of *Fox v. Dallas Hotel Co.*, 111 Tex. 461, 240 S.W. 517 (1922), in libel cases, citing *Houston Press Co. v. Smith*, 3 S.W.2d 900 (Tex.Civ.App.1928,writ dism'd); *Times Publishing Co. v. Ray*, 1 S.W.2d 471 (Tex.Civ.App.1927), aff'd Tex.Com.App., 12 S.W.2d 165 (1929); *Bell Publishing Co. v. Garrett Engineering Co.*, 141 Tex. 51, 170 S.W.2d 197 (1943), and *Fitzjarrald v. Panhandle Publishing Co.*, 149 Tex. 87, 228 S.W.2d 499 (1950). We note that each of these cases was decided prior to *Roosth & Genecov Production Co. v. White*, supra. *Fitzjarrald*, supra, held:

"If the pleadings and evidence in a case raise the issue as to whether an article published contains statements that are libelous *per se*, proper questions relating to such statements should be submitted to the jury. All statements that are privileged should be submitted to the jury for them to determine whether they were published with malice, and all statements libelous *per se* should be submitted to the jury for them to determine whether they are true or false. Each statement should be submitted separately. Respondent had the right to have the jury pass upon each statement separately, and if damages were recoverable, the instruction of the court should have limited the damages recoverable to those resulting from the publication of the privileged statements found to have been published with malice and the publication of those statements libelous *per se* found to be false."

In our case the jury found the statements were false and that the defendant acted with malice in making them.

We said in *Members Mutual Insurance Co. v. Muckelroy*, 523 S.W.2d 77 (1975, writ ref. n. r. e.):

"Under the revised rule, where the broad form of submission is adopted, the extent of the jury's consideration of the elements comprising the controlling issue becomes a matter of evidence and argument, subject to appropriate instruction of the court."

See *Mobil Chemical Co. v. Bell*, 517 S.W.2d 245 (Tex. 1974); *Shasteen v. Mid-Continent Refrigerator Co.*, 517 S.W.2d 437 (Tex.Civ.App.1975, writ ref. n. r. e.); Pope & Lowerre, Revised Rule 277-A, Better Special Verdict System of Texas, 27 S.W.L.J. 577 (1973). We believe it is discretionary with the trial court in libel cases to submit

separate questions with respect to each element of the case or to submit issues broadly, and that in our case the trial court did not abuse that discretion. We think the matter could have been more easily submitted by issues inquiring as to each of the writings upon which the plaintiff could have recovered, but we cannot say Special Issue No. 1 could not have been properly submitted with limiting instructions, cumbersome though they might have been.

The appellee argues that there is evidence that there was libel, that it was published, and that it was malicious. He says damages flowed from the over-all conduct of the appellants and there were not separate damages for each particular writing which libeled him. "The damages were all the result of the careful plan the Railroad devised to fire Joe Wherry. Mr. Wherry lost his job and was branded a narcotics user regardless of which writing appellants want examined. The damages which flow from these acts are the same regardless of which writing is involved."

The plaintiff did not obtain jury findings as to a conspiracy among the individual defendants or as to their having made libelous writings. We overrule the appellants' fifth point, but we sustain their fourth one, which complained of the overruling of the motion for judgment notwithstanding the verdict as to defendants Mont-

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gomery and Minahan. Judgment should not have been entered against them individually.

The appellants contend in their second and third points of error that the trial court erred in refusing to submit any issue on publication of the allegedly defamatory writing and in overruling their motion for judgment notwithstanding the verdict because there was no evidence of publication. We overrule these points.

Publication of defamatory words means to communicate orally or in writing or print to some third person capable of understanding their defamatory import and in such a way that he did so understand. 36 Tex.Jur.2d 317, Libel and Slander § 32.

Publication is an essential element of a libel action. Without publication there is no libel. *Lyle v. Waddle*, 144 Tex. 90, 188 S.W.2d 770 (1945).

There was evidence of publication. Montgomery's report was sent to seven persons, and it was read at the investigation. Minahan's letter was mailed to and apparently received by Rider. It may be presumed from Adams' action that he received the letter from Montgomery.

The appellants' first point of error is:

"The trial court erred in denying defendants' motion for judgment n. o. v., because all defendants' writings were at least conditionally privileged and there was no evidence of actual malice."

Their sixth point is:

"The trial court erred in denying defendants' motion No. 1, over proper objection, because it allowed the jury to consider as a defamatory writing the Public Law Board Award, which was absolutely privileged."

In *Denton Publishing Company v. Boyd*, 460 S.W.2d 881 (Tex.1971), the Supreme Court stated:

"Privilege is an affirmative defense in the nature of confession and avoidance, and, except where the plaintiff's petition shows on its face that the alleged libelous publication is protected by a privilege, the defendant has the burden of proving that the publication is privileged."

"Where the facts are undisputed and the language in the publication is not ambiguous, the question of privilege is one of law for the court.

"It is for the jury, however, to resolve any dispute in the evidence as to the circumstances under which the publication was made. . . ."

The trial court refused to submit these issues submitted by the appellants:

#### Special Issue No. A

Do you find from a preponderance of the evidence that all defendants' statements in writing reflected in Exhibits No. ..... were substantially true?

Answer "We do" or "We do not."

If you have answered Special Issue No. A "We do" and only in that event, then answer:

#### Special Issue No. B

Do you find from a preponderance of the evidence that the defendants acted in good faith, pursuant to a duty to report to another party with a common business interest?

Answer "We do" or "We do not."

Requested Special Issue No. A differs from submitted Issue No. 2 in that the burden of proof was placed on the plaintiff in Issue No. 2 as submitted to the jury:

Do you find from a preponderance of the evidence that such statements, if any, were substantially false and untrue?

The trial judge did not err in refusing to submit them. Issue No. A was the same ultimate issue in a different form, and since Special Issue No. B was conditioned on

Special Issue A, it was not error to refuse it. The appellant has waived any findings of privilege. Rule 279, Texas Rules of Civil Procedure.

The appellants' next points are that the trial court erred:

7. in refusing to submit any issue concerning fault, as required by the First and Fourteenth Amendments to the United States Constitution.

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8. in submitting Special Issue No. 5 concerning malice, because such issue did not properly submit the question of fault.

The trial court gave this definition of malice:

"You are instructed that 'malice' is defined as follows: Ill will, bad or evil motive, or such gross indifference to the rights of Plaintiff as amounted to a willful or wanton act done intentionally and without just cause or excuse on the part of the party accused of such acts."

The only objection made to this instruction was as follows:

"(f) With regard to the definition of malice, defendants specially object to the clause following a willful or wanton act, which reads 'Done intentionally and without just cause or excuse on the part of the party accused of such acts,' in that the same in inquiring about an excuse would attempt to shift the burden to the defendant, whereas the plaintiff has the burden on this issue."

The appellants contend that the First Amendment to the United States Constitution places upon the plaintiff in a defamation case the burden of obtaining a finding of truth-related fault on the part of defendant. They cite

*Gertz v. Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1975), and say that a finding of malice as required in *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), or a finding of gross negligence or of simple negligence would satisfy this requirement. They also contend that Texas law requires proof of actual malice in a libel action when the writings are conditionally privileged, that is, proof of knowing falsity or reckless disregard of the truth.'

The Texas Supreme Court in *Foster v. Laredo Newspapers, Inc.* 541 S.W.2d 809 (1976), interpreted recent findings of the Supreme Court that establish differing standards of care applicable to various classes of defamation plaintiffs. In speaking of *Gertz*, the Texas Supreme Court stated:

"The effect of the Court's holding that states may not impose liability without fault on publishers and broadcasters of defamatory falsehoods is to sanction a simple negligence standard as complying with the minimum requirements of the First and Fourteenth Amendments.

"As a further limitation upon the right of private individuals to recover in libel actions against publishers or broadcasters of defamatory falsehoods, the Court held in *Gertz* that a private individual 'who establishes liability under a less demanding standard than that stated by New York Times may recover only such damages as are sufficient to compensate him for factual injury.' 418 U.S. 323 at 350, 94 S.Ct. 2997 at 3012. . . ."

Texas has thus adopted the negligent standard of liability coupled with the actual injury requirement in *Gertz* as applied to defamation suits against media defendants.

Further, both Montgomery and Minahan have admitted that a good faith accusation could not have been made

and it would be false to say that Wherry was a narcotics user or that he violated Rule G. We think the jury was entitled to conclude from the evidence that they made false statements in writing that he was a narcotics user when they knew better.

The appellants did not object to the charge on the basis of improper submission of the question of fault. They have waived this question. Rule 274, Texas R.C.P.

The appellants' thirteenth through eighteenth points of error are that the trial court erred in submitting Issues 3, 4, and 6 over proper objection because there was no evidence to support them and in overruling defendants' motion for new trial because the evidence was factually insufficient to support the jury's finding to Issues 3, 4, and 6. They argue that under the standards set in *Gertz v. Robert Welch, Inc.*, supra, the plaintiff in a libel suit must prove actual damage caused by the libel. Also, that he is not entitled to recover for damages that are speculative and remote, citing *Denton Publishing Company v. Boyd*,

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448 S.W.2d 145 (Tex.Civ.App.1969), aff'd Tex., 460 S.W.2d 881 (1971).

"Compensatory damages allowable for defamation are either general or special. General damages are those that naturally, proximately, and necessarily result from the libel or slander. The law infers or presumes them, and they are recoverable under a general averment and without proof that they have been incurred. They include injuries to character or reputation, injuries to feelings, mental suffering or anguish, and other like wrongs and injuries incapable of money valuation. General damages are neither remote nor

speculative." 36 Tex.Jur.2d., Libel and Slander, 394-95, General and Special Damages § 94.

Damages for loss of employment are regarded as special damages and are recoverable where the loss was caused directly by the publication and circulation of the libel complained of. *Mayo v. Goldman*, 57 Tex.Civ.App. 475, 122 S. W. 449 (1909, no writ).

The jury made affirmative answers to Issues 3 and 4, which asked:

3. "Do you find from a preponderance of the evidence that the Plaintiff received an injury to his reputation or good name?"
4. "Do you find from a preponderance of the evidence that the statements made were a proximate cause of the injury to Plaintiff's reputation or good name?"

The jury's answer to Special Issue No. 6 was \$150,000. It asked:

"What sum of money, if any, do you find from a preponderance of the evidence, would reasonably compensate Plaintiff for injuries, if any, suffered as a result of such statements, if any."

"Answer in dollars and cents, if any. You are instructed that you are to take into consideration the following elements of damage and none other:

- (1) Injury to character reputation
- (2) Mental suffering or anguish
- (3) Financial injury to Plaintiff's business or occupation."

Assuming *Gertz* and *Foster* apply only to media defendants, under the common law and Article 5430, V.T.C.S.,

injury to Wherry's reputation is presumed, and with that injury presumed, his mental anguish may be taken into consideration in awarding damages. *Renfro Drug Co. v. Lawson*, 138 Tex. 434, 160 S.W.2d 246 (1942). The appellants did not object to "financial injury" being considered in Special Issue No. 6.

We have considered all the evidence in this case and we conclude that it adequately supports the jury's answers to Issues 3, 4, and 6.

Points of Error Nineteen through Twenty-two are that the trial court erred in:

19. submitting Special Issue No. 5, over proper objection, because there was no evidence that any defendant acted with malice toward the Plaintiff.
20. overruling defendants' amended motion for new trial because the evidence was factually insufficient to support the jury's finding of malice in response to Special Issue No. 5.
21. submitting Special Issue No. 7, over proper objection, because there was no evidence to justify an award of punitive damages.
22. overruling defendants' amended motion for new trial because the evidence was factually insufficient to support the jury's award of \$50,000 as punitive damages."

Contrary to the common law rule, a libelous publication is actionable under Article 5430, Vernon's Texas Civil Statutes, without proof of malice, regardless of whether it is libelous per se. *Gibler v. Houston Post Co.* 310 S.W.2d 377 (Tex.Civ.App.1958, wit ref. n. r. e.). However, where an action is based on a conditional or qualifiedly priv-

ileged publication, the plaintiff has the burden of proving that the publication was made with malice or a want of good faith to establish a cause of action.

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In such cases:

"Although the existence of actual or express malice is not presumed as a matter of law and must be proved, it need not be proved by direct or extrinsic evidence; its existence is sufficiently shown by evidence of facts and circumstances from which it is reasonably inferable. It may be inferred from the relation of the parties, the circumstances attending the publication, the language used, and from the words or acts of the defendants before, at, or after the time of the communication; but there must be evidence from which the jury can infer malice existing at the time of publication and actuating it. Malice is not implied or presumed from the mere fact of the publication, nor may it be inferred alone from the character or vehemence of the language used nor found from the falsity of the statement alone." 36 Tex.Jur.2d 475, Libel and Slander § 149.

Since the appellants waived any finding that the publication was qualifiedly or conditionally privileged, it is only in connection with the award of exemplary damages that we must consider whether there was sufficient evidence that the defendants acted with malice toward the plaintiff.

"The character of malice that must be shown to warrant the recovery of exemplary damages is not entirely clear. Generally, it is said that the malice must be actual or express, and not merely imputed. On the other hand, it has been held that malice implied or inferred from the wrongful act committed is sufficient. Possibly resolving these apparent inconsistencies, it has been said that necessary malice may be shown by evidence of personal ill will or animosity on the part of the defendant toward the plaintiff, or it may be inferred

where the libelous article was recklessly or carelessly published, that in some cases this is referred to as 'express malice' and other as 'implied malice,' and that this distinction is in name rather than in fact because it is malice whether it is proved by direct evidence in the one case, or inferred from recklessness or carelessness in the other." 36 Tex.Jur.2d 398, § 95, Libel and Slander.

The appellants contend that all the testimony concerning the various writings indicates that no one involved with them exhibited any ill-will or malice toward Wherry, that all the writings in evidence were authored in good faith, and that the communications were all between and among persons who had a strong common interest in truthful reporting of the accident facts. Further, that they have been fair to Wherry and even risked the ire of the railroad union by granting Wherry his seniority when he returned from the Army.

At the time of Wherry's accident, Montgomery was the superintendent of safety and assistant manager of personnel. He later resigned the position, exercised his seniority under the labor contract, and became a railroad switchman, the same type of job Wherry had before his suspension. We have already noted Montgomery's admissions concerning lack of good faith in accusing Wherry of being a narcotics user and his failure to report that there was only a "trace" of methadone and that there needed to be a further investigation.

Although Minahan's letter, written as director of labor relations, stated that a doctor had determined that traces of methadone were present in Wherry's system and that this constituted grounds for discharge under Rule G, Minahan testified that it would be a false charge to accuse him of being a drug user and to fire him for a Rule G violation.

Minahan was present during the taking of Robins' deposition when Robins said he would never accuse Wherry of being a user of narcotics, yet Minahan later signed and approved the board award stating Wherry was under the influence of or had been using methadone and that this was sufficient justification for his dismissal. There was also evidence that the Belt had a continuing problem with the union while Wherry remained in employ. Also, in presenting evidence during the hearing, Minahan failed to present the pathologist's report that Wherry did not have methadone in his system.

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We suggest that the jury was entitled to consider the evidence in this light, not that it must. We find the evidence supports the jury's answers to Issues 5 and 7.

Appellants state in their next two points of error that the trial court erred in sustaining plaintiff's hearsay objection to Belt's exhibit 5, Dr. Robins' letters of August 10, 1972, and his objection to the first six pages of Belt's exhibit 4. They argue that both exhibits were offered to show their good faith or lack of malice and were admissible under Article 5431, V.T.C.S. They say that it is not violative of the hearsay rule to admit evidence of written communications not offered to prove the truth of the facts stated therein, but only to show by inference the state of mind of the person who authorized the writing.

Article 5431 provides:

"In any action for libel, in determining the extent and source of actual damage and in mitigation of exemplary or punitive damage, the defendant may give in evidence, if specially pleaded, all material facts and circumstances surrounding such claim of damage and the defense thereto, and also all facts and circum-

stances under which the libelous publication was made, and any public apology, correction or retraction made and published by him of the libel complained of, and may also give in evidence, if specially pleaded in mitigation of exemplary or punitive damage, the intention with which the libelous publication was made. The truth of the statement, or statements, in such publication shall be a defense to such action."

Belt exhibit 5 was a letter Dr. Robins wrote to Montgomery on August 10, 1972, saying he had consulted a pathologist about the validity of the drug screen urinalysis that showed a positive reaction for methadone and that the pathologist knew of no compound which would produce the same test as methadone. The defendants have consistently taken the position that it was incorrect, unfair, and not in good faith to accuse Wherry of being a user.

Belt exhibit 4 was part of the Belt's brief prepared for the Public Law Board tending to show that the Belt's position before the Board, was that Wherry had been fired for violating safety rules, not Rule G. The part offered was repetitious of other evidence.

We hold that the trial judge did not abuse his discretion in excluding these exhibits. We do not consider either of them particularly significant and conclude that the error, if any, probably did not result in an improper judgment. Rule 434.

The last point of error is that the trial court committed fundamental error in entering judgment upon a purported cause of action for libel because the Texas libel statute is unconstitutional under the First and Fourteenth Amendments to the U. S. Constitution. We find no merit in this point.

The judgment of the trial court is reformed to delete the recovery against defendants Montgomery and Minahan individually. As thus reformed, it is affirmed.

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/s/ PHIL PEDEN  
Phil Peden  
*Associate Justice*

Judgment rendered and opinion filed December 2, 1976.

December 2, 1976

JUDGMENT

HOUSTON BELT & TERMINAL RAILWAY CO. ET AL

NO. 16755 VS. Appeal from District Court of Harris County. (Tr. Ct. # 926,782) Opinion delivered by Associate Justice Peden.

JOE W. WHERRY

This cause, being an appeal from the judgment rendered and entered by the court below on February 9, 1976, came on to be heard on the transcript of the record, and the same being inspected, because it is the opinion of this Court that there was error in the judgment in overruling the motion for judgment notwithstanding the verdict as to defendants T. Minahan and D. H. Montgomery, it is therefore considered, adjudged and ordered that the judgment of the court be reformed by deleting therefrom the recovery against defendants T. Minahan and D. H. Montgomery, and as reformed be affirmed; that the appellee, Joe W. Wherry, do have and recover of and from the appellant Houston Belt & Terminal Railway Co., and its surety, Fidelity and Deposit Company of Maryland, the sum or sums adjudged to him, together with the legal rate of interest from the date of the trial court judgment, until paid, and all his costs incurred, both in this Court and in the court below.

It is further ordered that this decision be certified below for observance.

From Clerk's Office, Court of Civil Appeals, Houston  
First Supreme Judicial District of Texas

BE IT REMEMBERED:

THAT at the term of the Honorable Court of Civil Appeals for the First Supreme Judicial District of the State of Texas, begun and holden at Houston on the 1st Monday of October, A. D. 1976, present TOM F. COLEMAN, Chief Justice, and Associate Justices PHIL PEDEN and FRANK G. EVANS.

In the cause HOUSTON BELT & TERMINAL RAILWAY COMPANY ET AL, Appellants, No. 16755

vs.

From District Court, Harris County  
TR Ct #926,782  
Opinion by .....

JOE W. WHERRY, Appellee, the following order was entered March 10, 1977:

"It is ordered that appellants' motion for rehearing be overruled."

I, MARIBELLE REICH, Clerk of the Court of Civil Appeals for the First Supreme Judicial District of Texas, at the City of Houston, hereby certify that the foregoing is a true copy of an order entered herein by this Court in the above entitled and numbered cause as appears of record in Minute Book 16, Page 101.

IN WITNESS WHEREOF, I hereunto set my hand and affix the seal of said Court at Houston this 31st day of August A. D. 1977.

MARIBELLE REICH, Clerk  
By Florine O'Sullivan, Deputy

[SEAL]

IN THE SUPREME COURT OF TEXAS

No. B-6708

May 25, 1977

Joe W. Wherry

Application of petitioner for writ of error to the Court of Civil Appeals for the First Supreme Judicial District having been duly considered, and the Court having determined that the application presents no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that said application be, and hereby is, refused.

It is further ordered that applicant, Houston Belt & Terminal Railway, and its surety, Fidelity and Deposit Company of Maryland pay all costs incurred on this application.

No. B-6708

June 22, 1977

Joe W. Wherry

Petitioner's motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled.

I, GARSON R. JACKSON, Clerk of the Supreme Court of Texas, do hereby certify that the above and foregoing is a true and correct copy of the orders of the Supreme Court of Texas in the case numbered and styled as above, as the same appears of record in the minutes of said Court under the dates shown.

WITNESS my hand and seal of the Supreme Court of Texas, at the City of Austin, this, the 30th day of August, 1977.

GARSON R. JACKSON, Clerk

By RICHARD P. BRAUN, Deputy

[SEAL]

No. 16,755

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IN THE  
COURT OF CIVIL APPEALS  
FOR THE FIRST SUPREME JUDICIAL  
DISTRICT OF TEXAS AT HOUSTON

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HOUSTON BELT & TERMINAL  
RAILWAY COMPANY, ET AL,

*Appellant,*

v.

JOE W. WHERRY,

*Appellee.*

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**NOTICE OF APPEAL TO THE  
SUPREME COURT OF THE UNITED STATES**

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*To The Honorable Court of Civil Appeals:*

Notice is hereby given that Houston Belt & Terminal Railway Company, the Appellant abovenamed, hereby appeals to the Supreme Court of the United States from the Final Judgment of the Court of Civil Appeals of Texas. On December 2, 1976, this Court affirmed the judgment against Appellant, Houston Belt & Terminal Railway Company. Subsequently, on March 10, 1977, this Court denied Appellant's Motion for Rehearing. Appellant timely filed a Writ of Error to the Supreme Court of the State of Texas, but the Writ of Error was refused with a notation "Writ Refused N.R.E." Appellant moved for rehearing in this matter in the Supreme Court of Texas, but the Motion for Rehearing was overruled on June 22, 1977, at which time the Court of Civil Appeals judgment became final.

This appeal is taken pursuant to 28 U.S.C. § 1247(2),  
28 U.S.C. § 1257(3) and 28 U.S.C. § 2103.

Respectfully submitted,  
**FULBRIGHT & JAWORSKI**

By /s/ JOHN D. GILPIN  
John D. Gilpin  
800 Bank of the Southwest  
Building  
Houston, Texas 77002 651-5151  
*Attorney For Appellant*

#### **CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the above and foregoing Notice of Appeal to the Supreme Court of the United States was served upon counsel of record, Mr. George Pletcher, of the firm of Helm, Pletcher, Hogan and Burrows, 2800 Two Houston Center, 909 Fannin Street, Houston, Texas 77002, by certified mail, return receipt requested, on this the 13th day of July, 1977, pursuant to Supreme Court of the United States Rule 34(1).

/s/ JOHN D. GILPIN  
John D. Gilpin

[filed July 13, 1977]

#### **45 U.S.C. § 153 (1970)**

##### **§ 153. National Railroad Adjustment Board.**

**First. Establishment; composition; powers and duties; divisions; hearings and awards; judicial review.**

There is established a Board, to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after June 21, 1934, and it is provided—

(a) That the said Adjustment Board shall consist of thirty-four members, seventeen of whom shall be selected by the carriers and seventeen by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of section 152 of this title.

(b) The carriers, acting each through its board of directors or its receiver or receivers, trustee or trustees, or through an officer or officers designated for that purpose by such board, trustee or trustees, or receiver or receivers, shall prescribe the rules under which its representatives shall be selected and shall select the representatives of the carriers on the Adjustment Board and designate the division on which each such representative shall serve, but no carrier or system of carriers shall have more than one voting representative on any division of the Board.

(c) Except as provided in the second paragraph of subsection (h) of this section, the national labor organizations, as defined in paragraph (a) of this section, acting each through the chief executive or other medium designated by the organization or association thereof, shall prescribe the rules under which the labor members of the Adjustment Board shall be selected and shall select such members and designate the division on which each member

shall serve; but no labor organization shall have more than one voting representative on any division of the Board.

(d) In case of a permanent or temporary vacancy on the Adjustment Board, the vacancy shall be filled by selection in the same manner as in the original selection.

(e) If either the carriers or the labor organizations of the employees fail to select and designate representatives to the Adjustment Board, as provided in paragraphs (b) and (c) of this section, respectively, within sixty days after June 21, 1934, in case of any original appointment to office of a member of the Adjustment Board, or in case of a vacancy in any such office within thirty days after such vacancy occurs, the Mediation Board shall thereupon directly make the appointment and shall select an individual associated in interest with the carriers or the group of labor organizations of employees, whichever he is to represent.

(f) In the event a dispute arises as to the right of any national labor organization to participate as per paragraph (c) of this section in the selection and designation of the labor members of the Adjustment Board, the Secretary of Labor shall investigate the claim of such labor organization to participate, and if such claim in the judgment of the Secretary of Labor has merit, the Secretary shall notify the Mediation Board accordingly, and within ten days after receipt of such advice the Mediation Board shall request those national labor organizations duly qualified as per paragraph (c) of this section to participate in the selection and designation of the labor members of the Adjustment Board to select a representative. Such representative, together with a representative likewise designated by the claimant, and a third or neutral party designated by the Mediation Board, constituting a board of three, shall within thirty days after the appointment of the neutral member, investigate the claims of the labor organization

desiring participation and decide whether or not it was organized in accordance with section 152 of this title and is otherwise properly qualified to participate in the selection of the labor members of the Adjustment Board, and the findings of such boards of three shall be final and binding.

(g) Each member of the Adjustment Board shall be compensated by the party or parties he is to represent. Each third or neutral party selected under the provisions of paragraph (f) of this section shall receive from the Mediation Board such compensation as the Mediation Board may fix, together with his necessary traveling expenses and expenses actually incurred for subsistence, or per diem allowance in lieu thereof, subject to the provisions of law applicable thereto, while serving as such third or neutral party.

(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

First division: To have jurisdiction over disputes involving train- and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This division shall consist of eight members, four of whom shall be selected and designated by the carriers and four of whom shall be selected and designated by the labor organizations, national in scope and organized in accordance with section 151a and section 152 of this title and which represent employees in engine, train, yard, or hosting service: *Provided, however,* That each labor organization shall select and designate two members on the First Division and that no labor organization shall have more than one vote in any proceedings of the First Division or

in the adoption of any award with respect to any dispute submitted to the First Division: *Provided further, however,* That the carrier members of the First Division shall cast no more than two votes in any proceedings of the division or in the adoption of any award with respect to any dispute submitted to the First Division.

Second division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, carmen, the helpers and apprentices of all the foregoing, coach cleaners, power-house employees, and railroad-shop laborers. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of the employees.

Third division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of employees.

Fourth division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions. This division shall consist of six members, three of whom shall be selected by the carriers and three by the national labor organizations of the employees.

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances

or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

(k) Any division of the Adjustment Board shall have authority to empower two or more of its members to conduct hearings and make findings upon disputes, when properly submitted, at any place designated by the division: *Provided, however,* That except as provided in paragraph (h) of this section, final awards as to any such dispute must be made by the entire division as hereinafter provided.

(l) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as "referee", to sit with the division as a member thereof, and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dis-

pute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this chapter for the appointment of arbitrators and shall fix and pay the compensation of such referees.

(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute. In case a dispute arises involving an interpretation of the award, the division of the Board upon request of either party shall interpret the award in the light of the dispute.

(n) A majority vote of all members of the division of the Adjustment Board eligible to vote shall be competent to make an award with respect to any dispute submitted to it.

(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay to the employee the sum to which he is entitled under the award on or before a day named. In the event any division determines that an award favorable to the petitioner should not be made in any dispute referred to it, the division shall make an order to the petitioner stating such determination.

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in

such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be conclusive on the parties, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board: *Provided, however,* That such order may not be set aside except for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order.

(q) If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or

carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Adjustment Board. The Adjustment Board shall file in the court the record of the proceedings on which it based its action. The court shall have jurisdiction to affirm the order of the division, or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of Title 28.

(r) All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after.

(s) The several divisions of the Adjustment Board shall maintain headquarters in Chicago, Illinois, meet regularly, and continue in session so long as there is pending before the division any matter within its jurisdiction which has been submitted for its consideration and which has not been disposed of.

(t) Whenever practicable, the several divisions or subdivisions of the Adjustment Board shall be supplied with suitable quarters in any Federal building located at its place of meeting.

(u) The Adjustment Board may, subject to the approval of the Mediation Board, employ and fix the compensations of such assistants as it deems necessary in carrying on its proceedings. The compensation of such employee shall be paid by the Mediation Board.

(v) The Adjustment Board shall meet within forty days after June 21, 1934, and adopt such rules as it deems necessary to control proceedings before the respective divisions and not in conflict with the provisions of this section. Immediately following the meeting of the entire Board and the adoption of such rules, the respective divisions shall meet and organize by the selection of a chairman, a vice chairman, and a secretary. Thereafter each division shall annually designate one of its members to act as chairman and one of its members to act as vice chairman: *Provided, however,* That the chairmanship and vice-chairmanship of any division shall alternate as between the groups, so that both the chairmanship and vice-chairmanship shall be held alternately by a representative of the carriers and a representative of the employees. In case of a vacancy, such vacancy shall be filled for the unexpired term by the selection of a successor from the same group.

(w) Each division of the Adjustment Board shall annually prepare and submit a report of its activities to the Mediation Board, and the substance of such report shall be included in the annual report of the Mediation Board to the Congress of the United States. The reports of each division of the Adjustment Board and the annual report of the Mediation Board shall state in detail all cases heard, all actions taken, the names, salaries, and duties of all agencies, employees, and officers receiving compensation from the United States under the authority of this chapter, and an account of all moneys appropriated by Congress pursuant to the authority conferred by this chapter and disbursed by such agencies, employees, and officers.

(x) Any division of the Adjustment Board shall have authority, in its discretion, to establish regional adjustment boards to act in its place and stead for such limited period as such division may determine to be necessary. Carrier members of such regional boards shall be designated in keeping with rules devised for this purpose by the carrier members of the Adjustment Board and the labor members shall be designated in keeping with rules devised for this purpose by the labor members of the Adjustment Board. Any such regional board shall, during the time for which it is appointed, have the same authority to conduct hearings, make findings upon disputes and adopt the same procedure as the division of the Adjustment Board appointing it, and its decisions shall be enforceable to the same extent and under the same processes. A neutral person, as referee, shall be appointed for service in connection with any such regional adjustment board in the same circumstances and manner as provided in paragraph (l) of this section, with respect to a division of the Adjustment Board.

**Second. System, group, or regional boards: establishment by voluntary agreement; special adjustment boards: establishment, composition, designation of representatives by Mediation Board, neutral member, compensation, quorum, finality and enforcement of awards.**

Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this chapter, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional

board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board.

If written request is made upon any individual carrier by the representative of any craft or class of employees of such carrier for the establishment of a special board of adjustment to resolve disputes otherwise referable to the Adjustment Board, or any dispute which has been pending before the Adjustment Board for twelve months from the date the dispute (claim) is received by the Board, or if any carrier makes such a request upon any such representative, the carrier or the representative upon whom such request is made shall join in an agreement establishing such a board within thirty days from the date such request is made. The cases which may be considered by such board shall be defined in the agreement establishing it. Such board shall consist of one person designated by the carrier and one person designated by the representative of the employees. If such carrier or such representative fails to agree upon the establishment of such a board as provided herein, or to exercise its rights to designate a member of the board, the carrier or representative making the request for the establishment of the special board may request the Mediation Board to designate a member of the special board on behalf of the carrier or representative upon whom such request was made. Upon receipt of a request for such designation the Mediation Board shall promptly make such designation and shall select an individual associated in interest with the carrier or representative he is to represent, who, with the member appointed by the carrier or representative requesting the establishment of the special board, shall constitute the board. Each member of the board shall be compensated by the party he is to represent. The members of the board so designated shall determine

all matters not previously agreed upon by the carrier and the representative of the employees with respect to the establishment and jurisdiction of the board. If they are unable to agree such matters shall be determined by a neutral member of the board selected or appointed and compensated in the same manner as is hereinafter provided with respect to situations where the members of the board are unable to agree upon an award. Such neutral member shall cease to be a member of the board when he has determined such matters. If with respect to any dispute or group of disputes the members of the board designated by the carrier and the representative are unable to agree upon an award disposing of the dispute or group of disputes they shall by mutual agreement select a neutral person to be a member of the board for the consideration and disposition of such dispute or group of disputes. In the event the members of the board designated by the parties are unable, within ten days after their failure to agree upon an award, to agree upon the selection of such neutral person, either member of the board may request the Mediation Board to appoint such neutral person and upon receipt of such request the Mediation Board shall promptly make such appointment. The neutral person so selected or appointed shall be compensated and reimbursed for expenses by the Mediation Board. Any two members of the board shall be competent to render an award. Such awards shall be final and binding upon both parties to the dispute and if in favor of the petitioner, shall direct the other party to comply therewith on or before the day named. Compliance with such awards shall be enforceable by proceedings in the United States district courts in the same manner and subject to the same provisions that apply to proceedings for enforcement of compliance with awards of the Adjustment Board.

NOV 5 1977

MICHAEL RODAK, JR., CLERK

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1977

NO. 77-419

**HOUSTON BELT & TERMINAL RAILWAY  
COMPANY, Appellant**

v.

**JOE W. WHERRY, Appellee**

On Appeal from Texas Court of Civil Appeals  
First Supreme Judicial District

**REPLY TO JURISDICTIONAL STATEMENT**

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1977

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NO. 77-419

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**HOUSTON BELT & TERMINAL RAILWAY  
COMPANY, *Appellant***

v.

**JOE W. WHERRY, *Appellee***

---

**On Appeal from Texas Court of Civil Appeals  
First Supreme Judicial District**

---

**REPLY TO JURISDICTIONAL STATEMENT**

---

**STATEMENT OF THE NATURE AND  
RESULT OF THE CASE**

This is a libel action and the opinion of the Court of Civil Appeals correctly sets forth the nature and result of the case. *See* Appellant's Appendix B.

**STATEMENT OF THE CASE**

The Court of Civil Appeals' opinion correctly states the facts of this case. Appellant's jurisdictional statement omits some critical facts which are discussed below.

Because Appellant's union felt that Appellee should not be allowed to return to his job with full seniority after a tour of duty with the military, the Department of Labor had to intervene in order to get Appellee reinstated as a switchman with full seniority. That reinstatement created a dispute between Appellant's management and the Union. During this controversy Appellee received his very minor injury on July 14, 1972.

Dr. Robins, Appellant's company doctor, requested a Drug Screen Urinalysis on the day of injury. The test on Appellee's sample was run three days later as a part of a large number of other samples which were stockpiled from a methadone testing program being conducted at the hospital. No physician conducted the tests; they were conducted by technicians in the laboratory. (S.F. 18)

Dr. Robins received Plaintiff's Exhibit 1 which noted a trace of methadone in the urine. He telephoned Mr. Montgomery, one of Appellant's officers, passed on this information to him, and told him that he couldn't say that this meant anything, but that it might bear further testing and investigation. (S.F. 28) The doctor stressed that he came to no conclusion and offered no medical opinion about the result of the test. (S.F. 34-35)

Following this telephone conversation Mr. Montgomery wrote and circulated Defendant's Exhibit 1 which stated "laboratory results of the urine specimen was positive for methadone, which is a synthetic drug commonly used in the withdrawal treatment of heroin addicts." That statement was clearly libelous. It charged Appellee with taking or using methadone and implied that he was a heroin addict. Under Article 725c, §§ 2-4 of the Texas

Penal Code in effect in 1972, it was a felony punishable by detention in the penitentiary to habitually use, be addicted to, or be under the influence of narcotics in any way. The Act included methadone and heroin.

Mr. Montgomery's letter addressed to the officers of Appellant indicated on the exhibit failed to reflect that, at most, a "trace" was found and that Dr. Robins had told him this test was not definitive and further investigation would have to be conducted before he could form an opinion from this test. The implication of Mr. Montgomery's letter was plain and it was false.

The effects of the language of Mr. Montgomery's letter could have been easily predicted. The same day that Mr. Montgomery circulated this letter, Mr. B. R. Adams refused to allow Appellee to return to work following his release by Dr. Robins, and notified him in writing that he was being withheld from service pending an investigation.

It is obvious that Mr. Adams understood Mr. Montgomery's letter to plainly state that Appellee was using or was under the influence of narcotics while on duty which, if true, would have furnished justification for his being withheld from service pending investigation. In this case, it would have been a violation of the agreement between Union and Appellant to withhold Appellee from service pending investigation if he had not been in violation of Railroad Rule "G", or using or under the influence of narcotics. It is significant that Mr. Montgomery testified at trial that Dr. Robins never told him, or anybody else at the Railroad, to his knowledge, that Appellee was a drug user, addict or under the influence of drugs or narcotics. (S.F. 104)

Following the receipt of the narrative report from Dr. Robins, which was mailed on July 24, 1972, Appellants notified Appellee of a formal investigation against him to investigate the facts of his accident. (PX-6) The Railroad did not openly charge Appellee with violation of Rule G, but failed to return him to work pending the investigation. At the investigation Appellant's officers read the doctor's reports and Montgomery's memorandum.

This was Appellee's first knowledge that he was being branded a drug user and he went directly from the investigation to the Toxicology Laboratories of Houston to be examined thoroughly so that he could demonstrate clearly to the Railroad that he was not a drug user.

Dr. Spikes of Toxicology Laboratories tendered his report clearing Appellee of using methadone or any other commonly known drug of abuse. This test and result supported Appellee's sworn evidence that he had *never* used methadone or any other narcotics. The report of those tests was received by Appellant two days before they fired him, ostensibly for being injured on Friday and not acquiring an accident report until Monday, even though the Claims Office was closed on Saturday afternoon and Sunday. They claimed they also fired him for being an unsafe employee since he bumped his knee and cut his eye and for other innocuous general rules of conduct. It is a clear inference from the record that the Railroad, both Union and Management, wanted rid of Appellee and used a subterfuge to accomplish that goal—finally resorting to libelous accusations known to be false to back up their scheme. According to the record, the last information received by the Belt in con-

nnection with this matter was Dr. Spikes' report. However, DX-5, which was not admitted into evidence, bears a date of August 10, 1972. It is the last claimed information received by the Appellants concerning methadone. The record in this case is devoid of any claim that Appellants ever acquired any more information or did any further investigation after August 10, 1972.

This is extremely important in light of the evidence given by Montgomery and Minahan, another officer of Appellant. It is also very important in regard to the August 23, 1972 letter written by Mr. Minahan to the Department of Labor. All of the facts upon which Mr. Montgomery and Mr. Minahan based their sworn testimony about Appellee's use of methadone were gathered no later than August 10, 1972.

It is necessary at this point to skip ahead in time to January 26, 1973, when Mr. Minahan swore on his deposition that the records he had did not indicate that Appellee could be charged with being a drug user or drug addict or being under the influence of drugs. (S.F. 244) Mr. Minahan also swore that it would be incorrect to say that Appellee was fired because of a Rule G violation and that he was under the influence of drugs or used drugs.

Then, in January, 1976, at the trial of this case, Mr. Montgomery swore that it would not have been "in good faith" to have accused Appellee of being a narcotics user. (S.F. 75-76) Mr. Minahan testified at the trial that it would have been false for anyone to have charged Appellee with being a drug user. (S.F. 116) He swore that he always maintained it would have been false to suggest that this man was in violation of Rule G. (S.F. 122)

Dr. Robins swore on his deposition and at the time of trial that he did not intend to brand Appellee as a drug user and that if someone else had made an accusation against him based upon what Dr. Robins knew, that he would have defended Appellee against such an accusation. (S.F. 68-69)

With this background, a review of the letter which Mr. Minahan sent to Merle Rider at the Department of Labor on August 23, 1972 is in order. Thirteen days before Mr. Minahan wrote the letter he had available to him all of the information that he ever acquired in this matter. Based upon this information Mr. Minahan later swore at trial that it would be false to accuse Appellee of being a drug user or being in violation of Rule G, but Mr. Minahan wrote as follows:

*"It was also determined by the doctor who examined Mr. Wherry following his injury, caused when Mr. Wherry passed out and fell, that traces of methadone were present in Mr. Wherry's system, which constitutes grounds for discharge under Uniform Code of Operating Rules, Rule 'G'."* (emphasis added)

Dr. Robins never determined that methadone was present in Appellee's system since he didn't run the test or make the report. Nor did he ever tell Appellant that the test run established the presence of methadone. It is obvious that Mr. Minahan knew these statements were false in light of his later testimony based upon the knowledge he had acquired prior to writing this letter. Mr. Minahan claimed in the other portions of the letter that the Belt had fired Appellee for some inconsequential rule violations. However, he gratuitously added this paragraph

which contained the libel, which he knew to be false, and which exhibited actual malice.

The jury found and was well justified in finding that Appellee had been falsely and maliciously libeled and has suffered substantial damages.

**THE QUESTIONS RAISED BY APPELLANT  
WERE NOT PROPERLY PRESENTED OR PRE-  
SERVED IN THE STATE COURT SO THAT THE  
LOWER COURT'S DECISION IS SUPPORTED  
BY AN ADEQUATE, INDEPENDENT STATE  
GROUND.**

Appellant asserts that the case at bar was submitted pursuant to the Texas Libel Statute, Tex. Rev. Civ. Stat. Ann., Article 5430 (1958), as a strict liability action (no fault required). Such claim is wrong and because it is wrong, Appellant presents no issue for this Court to review. This case was tried and decided on the issue of actual malice in connection with the libel proved. Appellant published defamatory, false material with knowledge of the falsity or at least "with reckless disregard of whether it was false or not." *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). The standard of fault in this case was malice, not merely negligence. Any objection Appellant may have had to the definition of malice used in the charge to the trial court was waived by Appellant's failure to meet the clear, reasonable, procedural requirements of the Texas Rules of Civil Procedure. Therefore, there is an adequate state ground for affirmance. *Henry v. Mississippi*, 379 U.S. 443 (1965).

The Texas Libel Statute, quoted in full in Appellant's jurisdictional statement, is merely a definition of libelous

material. The post-*Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1975), decisions in Texas make it clear that Texas Courts have not ignored this court's holding that a system of strict liability for defamation can contravene the First Amendment. In *Foster v. Laredo Newspapers, Inc.*, 541 S.W.2d 809 (Tex. 1976), cert. denied, 45 U.S.L.W. 3562 (U.S. Feb. 22, 1977), the Texas Supreme Court joined the majority of state courts that have written on the subject by adopting a negligence standards of care.<sup>1</sup>

Texas courts in general are in step with the Constitutional requirements for defamation actions. The Court of Civil Appeals in the instant case recognized that a defamation judgment must be supported by evidence of truth-related fault. In fact, the court took great care to set forth the testimony that supported the fault finding by the jury. Appellant's Appendix B-1-9. The court correctly pointed out that the evidence established that Appellee went far beyond the requirement of proving simple negligence by sustaining his burden of proving by a preponderance of the evidence that Appellant maliciously published the complained of libelous material. The factual summary above indicates the type of evidence which supports the conclusion that Appellants published the defamatory material with knowledge of its falsity or

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1. States adopting a negligence standard: *Cahil v. Hawaiian Paradise Park Court*, 543 P.2d 1356 (1975); *Troman v. Wood*, 340 N.E.2d 292 (1975); *Kansas, Goban v. Globe Publishing Company*, 531 P.2d (1975); *Jacron v. Sindorf*, 350 A.2d 688 (1976); *Stone v. Essex County Newspapers, Inc.*, 303 N.E.2d 161 (1975); *Thomas H. Maloney & Sons v. E. W. Scripps Co.*, 334 N.E.2d 494 (1974), cert. den'd, 423 U.S. 883 (1975); *Martin v. Griffin Television, Inc.*, 549 P.2d 85 (Okla. 1976); *Tasket v. King Broadcasting Co.*, 546 P.2d 81 (1976).

a reckless disregard of whether or not it was false. Suffice it to say that the Court of Civil Appeals had ample support in the record when it stated that "the jury was entitled to conclude from the evidence that [Petitioner] made false statements in writing that [Respondent] was a narcotics used when [it] knew better." Appellant's Appendix B-18. Such finding clearly satisfies the requirements of this Court.

Realizing it failed to preserve its error under state procedure and that the malice finding is binding and dispositive of this appeal, Appellant attempts to shift this Court's attention from the malice finding in Special Issue No. 5<sup>2</sup> to the jury finding in Special Issue No. 1.<sup>3</sup> Special Issue No. 1 was an inquiry into whether the ordinary reader would have interpreted the complained of writings as an accusation by Appellant that Appellee was a narcotics addict. Without such a preliminary finding, the fault issue would have been meaningless. Special Issue No. 1 did not attempt to impose strict liability, as claimed by Appellant. The fault issue was Special Issue No. 5. Any discussion on the adequacy of Appellant's objections or lack thereof to the instructions accompanying the fault issue, involves state procedure. The objection to the fault finding was:

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2. The jury was asked in Special Issue No. 5: Do you find from a preponderance of the evidence that the Defendant acted with malice in regard to the statements made? Then malice was defined and Appellants failed to properly object to the definition used by the trial court.

3. The jury was asked in Special Issue No. 1 "Do you find from a preponderance of the evidence that the Defendant Railroad stated in writing that Joe Wherry was a narcotics user in violation of Railroad Rule G?

There is an attempt to impose liability without fault in that no inquiry was made concerning the culpability of the Defendant and culpability or harm is inferred from the term "a narcotics user in violation of Railroad Rule G." Defendants rely in that regard on *Gertz v. Robert Welch, Inc.*, 94 Supreme Court 2997 (1974), Supreme Court of the United States case.

It is obvious that Appellant's objections make no sense as an objection to Special Issue No. 5 or the definition of malice included therein. The objection specifically refers to language that is not even used in that special issue. Texas Rules of Civil Procedure, Rule 274, provides that "a party objecting to a charge must point out distinctly the matter to which he objects and the grounds of his objection."

The general legislative commentary to Rule 274 indicates that the rule is designed to promote the reasonable state concern that trial judges be protected "in those cases where they exercise good faith in an effort to discover the defects in the charge, but are unable to do so." The rule gives the trial court a "fair opportunity to correct any error or deficiency." *Osteen v. Crumpton*, 519 S.W.2d 263 (Tex. Civ. App.—1975, err. ref'd.). The trial court was not given a fair opportunity to correct any defect that may have existed in the definition of malice supplied with the fault issue. By its inaction in making a distinct objection to the fault issue, Appellant has waived any right it may have had to complain about the form of the fault issue submission. If Appellant wanted a different definition, it had to tell the court specifically or waive any mistake in the Court's definition.

Similarly, Appellant waived any objection it may have had to the introduction of the Public Law Board Award to the jury. The court below correctly notes that no objection was made at the time of trial to the introduction of the Public Law Board Award. Appellant's Appendix B-23. Texas courts have long recognized that a failure to make a timely objection to proffered evidence prevents a party from complaining that the jury may have considered the evidence. *Pacific Fire Insurance Co. v. Donald*, 217 S.W.2d 431 (Tex. Civ. App.—1949, writ ref'd., n.r.e.); *Shadowins v. Shadowins*, 271 S.W.2d 165 (Tex. Civ. App.—1954, writ ref'd., n.r.e.). The Court of Civil Appeals points out that there was other sufficient evidence of libel in the record from which the jury could have reasonably arrived at its answers to the special issues. Thus, Appellant cannot show that it was harmed by the introduction of the Public Law Board award. Appellant could have avoided introduction of its award by making the proper objection, or asking for an instruction that the jury not consider said evidence. Appellant did neither. Appellant did not even plead absolute privilege in this lawsuit until all parties had rested in open Court. Then, after belatedly pleading absolute privilege, Appellant never requested that the Court give a limiting instruction to the jury directing them not to consider the Public Law Board Award in connection with its determination as to whether Appellants had libeled Appellee. Rule 279 of the Texas Rules of Civil Procedure states in part as follows:

Failure to submit a definition or explanatory instruction shall not be deemed a ground for reversal of the judgment unless a substantially correct definition or explanatory instruction has been requested

in writing and tendered by the party complaining of the judgment . . . Upon appeal all independent grounds of recovery or of defense not conclusively established under the evidence and upon which no issue is given or requested shall be deemed as waived . . .

*See also First State Bank & Trust Co. of Edinburg v. George*, 519 S.W.2d 198 (Tex. Civ. App.—1974, writ ref'd., n.r.e.) If no correct explanatory instruction is requested, there is no predicate laid for consideration on appeal under state law.

#### APPELLANT RAISES NO SUBSTANTIAL FEDERAL QUESTIONS

As Appellee has previously indicated, Appellant has misstated the current state of Texas law with regard to its argument that libel actions are strict liability actions. Appellant's argument that this case raised the issue of whether the *Gertz* decision applies only to cases involving "media" defendants is equally spurious.

In the instant case, Appellee introduced evidence of actual malice and received a malice finding from the jury.\*

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4. Since there was a supported malice finding, Appellee has not emphasized the solid reasons for not applying the holding in *Gertz* to cases where there is a non-media defendant. One of the major reasons for such limitation would be that the transcending societal interest in promoting "uninhibited, robust and wide-open" debate on public issues does not exist when a defendant is a non-media defendant. See Frakt, *The Evolving Law of Defamation*, *New York Times v. Sullivan to Gertz v. Robert Welch, Inc., and Beyond*, 6 Rutgers-Camden Law Journal, 471 (1975); Nemmer, *Introduction/Is Freedom of the Press a Redundancy, "What Does it Add to Freedom of Speech?"*, 26 Hastings Law Journal, 639 (1975). This court's limiting language in *Gertz* to "publishers and broadcasters" lends currency to the acceptability of media/non-media differentiation.

A close examination of the cases cited by Appellant in its jurisdictional statement reveals that the issue in those cases is clearly not raised here. In the cases relied upon by Appellant, the courts were faced with the question of whether damages could be presumed when negligence served as the standard of liability. *See Jacron Sales Co. v. Sindorf*, 350 A.2d 688 (Maryland, 1976); *Rowe v. Metz*, 564 P.2d 422 (Colo. App. 1977). This court opened the door to presumption of damages where malice is the standard in *Gertz* at

[T]he states may not permit recovery of presumed or punitive damages at least when liability is not based on a showing of knowledge of falsity or a reckless disregard for the truth.

When there is a finding of malice presumed and punitive damages have been held recoverable by state courts and by federal courts sitting in a diversity action. *Carson v. Allied News Company*, 529 F.2d 206 (7th Cir. 1976); *Davis v. Schuchat*, 510 F.2d 731 (D.C. Cir. 1975).

Although damages can be presumed when malice is shown, Appellee need not rely upon the presumption since evidence of substantial, actual injury was introduced. Appellee testified to the loss of job opportunities that flowed from Appellant's libel and firing. The trial court included injury to character, reputation, mental suffering or anguish and financial injury to Appellee's business or occupation. Appellant failed to object to the efficacy of any of these elements and only claimed evidentiary absence or insufficiency. The Court of Civil Appeals correctly found sufficient evidence to support all three elements of damages. No claim is made that financial injury

is not "actual" damage. In *Gertz* at 349-50, this Court held that it "need not define 'actual injury,' since trial courts have wide experience in framing appropriate jury instructions in tort actions." This Court went on to recognize that out-of-pocket loss was not the only kind of actual injury, but also impairment of reputation and mental anguish and suffering are customary types of actual harm.

### SUMMARY

Texas libel law is in accord with constitutional requirements. Any valid objection Appellant may have had to the trial court's definition of actual malice or to the introduction of the Public Law Board Award into evidence was waived by its failure to comply with reasonable, state procedural rules. There were supported findings by the jury that Appellant maliciously libeled Appellee, and that as a result of this libel, Appellee suffered serious, actual injury.

### CONCLUSION

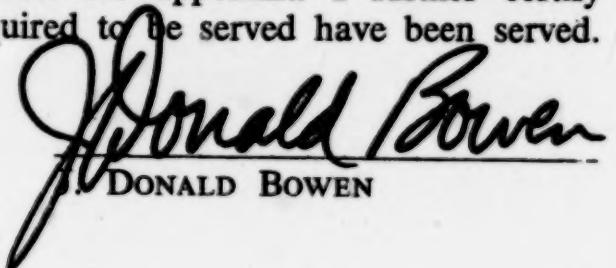
For the foregoing reasons, probable jurisdiction should not be noted, and the judgment of the lower court should in all respects be affirmed.

Respectfully submitted,

J. DONALD BOWEN  
Attorney for Appellee

### CERTIFICATE OF SERVICE

I hereby certify that on this 5<sup>th</sup> day of November, 1977, three copies of this Reply to Jurisdictional Statement were mailed, by first class mail, postage prepaid, to John D. Gilpin and Osborne J. Dykes III, Fulbright & Jaworski 800 Bank of the Southwest Building, Houston, Texas 77002, counsel for appellant. I further certify that all parties required to be served have been served.



DONALD BOWEN

Supreme Court, U. S.

E I L E D

NOV 18 1977

IN THE

MICHAEL RODAK, JR., CLERK

# Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-419

HOUSTON BELT & TERMINAL RAILWAY COMPANY,

*Appellant,*

v.

JOE W. WHERRY,

*Appellee.*

ON APPEAL FROM THE TEXAS COURT OF CIVIL APPEALS,  
FIRST SUPREME JUDICIAL DISTRICT

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## RESPONSE TO APPELLEE'S "REPLY TO JURISDICTIONAL STATEMENT"

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1977

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No. 77-419

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HOUSTON BELT & TERMINAL RAILWAY COMPANY,  
*Appellant,*  
v.  
JOE W. WHERRY,  
*Appellee.*

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ON APPEAL FROM THE TEXAS COURT OF CIVIL APPEALS,  
FIRST SUPREME JUDICIAL DISTRICT

---

**RESPONSE TO APPELLEE'S  
"REPLY TO JURISDICTIONAL STATEMENT"**

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**INTRODUCTORY STATEMENT**

Appellee does not deny that the questions presented are substantial. Rather appellee's Reply to Jurisdictional Statement attempts to submerge this appeal in a sea of state procedural rules. While appellant is confident it has complied with all applicable state rules in asserting its federal rights, this Court need not untangle or resolve fine questions of Texas special issue practice in order to determine that the federal questions are properly presented. Even if there had been a waiver under a state procedural rule of general applicability, such a waiver would not prevent

review in this Court, because appellant has asserted its rights below plainly and reasonably at every opportunity. “[T]he assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice.” *Davis v. Wechsler*, 263 U.S. 22, 24 (1923).

By this Response, appellant seeks to dispell any doubt or confusion which may have been created as to whether and how the federal questions were raised below.

#### **THE FEDERAL QUESTIONS WERE PROPERLY RAISED IN THE COURTS BELOW**

1. *Failure to submit fault issue.* Appellee states at page 7 of his Reply to Jurisdictional Statement, “This case was tried and decided on the issue of actual malice . . .” and cites *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). This statement is plainly in error. Common-law malice was submitted to the jury (Jurisdictional Statement, A-3), but “actual malice” in the *New York Times* sense of knowing or reckless falsity was not. Nor was negligence or gross negligence or any other standard of truth-related fault submitted. The jury found ill will, but not want of care in relation to truth or falsity.

By confusing common-law malice and “actual malice”, appellee follows the error of the Texas Court of Civil Appeals below. Common-law malice is not a truth-related fault standard, and it certainly is not a shade or variation of “actual malice.” In *Beckley Newspapers Corp v. Hanks*, 389 U.S. 81 (1967), the trial court instructed the jury that it could find for the plaintiff if defendant had published certain editorials with “bad or corrupt motive” or “from personal spite, ill will, or a desire to injure plaintiff.” 389 U.S. at 82. This Court termed this instruction “clearly impermissible” under the *New York Times* standard. *Id*. In *Letter Carriers v. Austin*, 418 U.S. 264 (1974), the Court

considered a malice instruction strikingly similar to that used by the trial court in this case:

The term “actual malice” is that conduct which shows in fact that at the time the words were printed they were actuated by some sinister or corrupt motive such as hatred, personal spite, ill will, or desire to injure plaintiff; or that the communication was made with such gross indifference and recklessness as to amount to a wanton or willful disregard of the rights of the plaintiff.

418 U.S. at 269. This Court rejected this charge as a “fundamental misreading” of the applicable “actual malice” fault standard. Common-law malice cannot serve as a substitute for “actual malice” any more than it can serve as a substitute for negligence.

Appellant does not complain on this appeal of an improper definition of common-law malice, or of any failure to define common-law malice, as suggested in appellee’s Reply. Appellant complains rather that the trial court failed to submit a negligence issue, or any other constitutionally permissible fault issue. Objection was made at the trial level at the proper time, repeatedly and with clarity and with specific citation to this Court’s *Gertz* opinion. Appellant submits therefore that the question of whether the trial court erred in refusing to submit a fault issue to the jury is properly before this Court.

2. *Failure to require proof of “actual damages.”* Appellee argues that an award of presumed damages was permissible because “actual malice” was found. The premise of this argument is faulty. Actual malice was not found. The conclusion therefore does not follow. The Texas Court of Civil Appeals expressly relied upon the “presumed damages” doctrine. (Jurisdictional Statement, B-19). It had to rely on presumed damages, because there was no

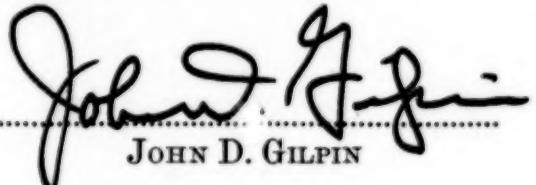
evidence of actual damages. While there was some evidence that appellee had difficulty getting jobs, there was no evidence that the difficulty resulted from any statement by defendant, rather than some other cause, such as, for example, his Undesirable Discharge from the U. S. Army. (S.F. 186). In the absence of any evidence of actual damages, the permissibility of presumed damages in a libel action against a non-media defendant is properly before this Court.

3. *Submitting Public Law Board Award to jury.* Appellee misinterprets appellant's complaint concerning the Public Law Board Award as an objection to the admission of the Award into evidence. (Reply to Jurisdictional Statement at 11). Appellant's complaint is not directed at the admission of the Award into evidence, but to the charge of the trial court to the jury, which permitted the jury to find that the Award was a libel by the railroad, notwithstanding a pleaded defense of absolute privilege under the Railway Labor Act. Since appellant's objection goes to the form of Special Issue No. 1, and does not raise failure to define or explain some term in the charge, the portion of Rule 279 of the Texas Rules of Civil Procedure cited by appellee at pages 11 and 12 of his Reply to Jurisdictional Statement is wholly inapplicable. It is unquestioned that appellant's objection to the form of the issue was made with the requisite clarity, as required by Rule 274 of the Texas Rules of Civil Procedure. There was therefore no waiver of this question by appellant, and it is properly presented for review on this appeal.

### **CONCLUSION**

For the foregoing reasons, probable jurisdiction should be noted.

Respectfully submitted,

  
JOHN D. GILPIN

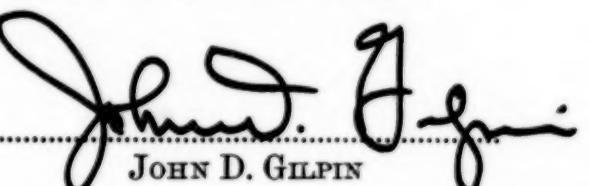
  
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### **CERTIFICATE OF SERVICE**

I hereby certify that on this 16th day of November, 1977, three copies of this Response to Appellee's "Reply to Jurisdictional Statement" were mailed by first class mail, postage prepaid, to George Pletcher, Esq., Helm, Pletcher, Hogan & Burrow, 2800 Two Houston Center, Houston, Texas 77002, counsel for appellee. I further certify that all parties required to be served have been served.

  
JOHN D. GILPIN